No. 98-9828-CFY Title: Maria Suzuki Ohler, Petitioner
v.
United States

Docketed: June 17, 1999 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jun 7 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 1, 1999)
	Jul 20 1999	Order extending time to file response to petition until August 18, 1999.
	Aug 18 1999	Order further extending time to file response to petition until September 1, 1999.
	Aug 26 1999	Supplemental brief of petitioner Maria S. Ohler filed.
	Sep 1 1999	Brief of respondent United States in opposition filed.
	Sep 16 1999	DISTRIBUTED. October 8, 1999
	Sep 20 1999	Reply brief of petitioner Maria S. Ohler filed.
	Oct 12 1999	REDISTRIBUTED. October 15, 1999
	Oct 18 1999	Petition GRANTED. SET FOR ARGUMENT March 20, 2000. **********
	Oct 26 1999	Motion of petitioner for appointment of counsel filed.
	Nov 1 1999	DISTRIBUTED. November 5, 1999 (page 10)
	Nov 8 1999	Motion for appointment of counsel GRANTED and it is ordered that Benjamin L. Coleman, Esquire, of San Diego, California, is appointed to serve as counsel for the petitioner in this case.
	Nov 22 1999	Joint appendix filed.
	Nov 24 1999	Brief of petitioner Maria S. Ohler filed.
	Dec 2 1999	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Dec 22 1999	Order extending time to file respondent's brief on the merits to and including January 10, 2000.
	Dec 28 1999	Order further extending time to file respondent's brief on the merits to and including Tuesday, January 18, 2000.
	Jan 13 2000	CIRCULATED.
	Jan 18 2000	Brief of respondent United States filed.
	Feb 18 2000	Reply brief of petitioner Maria S. Ohler filed.
	Mar 1 2000	Record filed.
	Mar 10 2000	Record filed.
	Mar 20 2000	ARGUED.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARIA SUZUKI OHLER,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
JUN 7 - 1999
OFFICE OF THE CLERK

MOTION FOR LEAVE TO
PROCEED
IN FORMA PAUPERIS

Pursuant to Title 18, United States Code, § 3006A(d)(6) and Rule 39 of this Court, Petitioner, Maria Suzuki Ohler, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of fees or costs and to proceed in forma pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18, United States Code, § 3006A in the district court and on appeal the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: June 7, 1999

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 1999

MARIA SUZUKI OHLER,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a defendant waives her right to appeal a ruling granting the government's *in limine* motion to introduce evidence of her prior conviction under Federal Rule of Evidence 609(a)(1) if she attempts to "remove the sting" of the conviction by introducing the conviction while testifying on direct examination?

No. _____

OCTOBER TERM, 1999

MARIA SUZUKI OHLER,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Maria Suzuki Ohler, respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 9, 1999.

JURISDICTION AND CITATION OF OPINION BELOW

On March 9, 1999, the Ninth Circuit affirmed petitioner's conviction in a published opinion. See United States v. Ohler, 169 F.3d 1200 (9th Cir. 1999) (Appendix). This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

FEDERAL STATUTORY PROVISION

1. Fed. R. Evid. 609(a)(1):

> For the purpose of attacking the credibility of a witness, evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused;

STATEMENT OF THE CASE

Petitioner attempted to enter the United States from Mexico at the San Ysidro, California, Port of Entry on July 29, 1997. Ohler, 169 F.3d at 1201. Customs officers searched the van she was driving and found more than eighty-one pounds of marijuana concealed in the vehicle. Id. Petitioner subsequently was charged with importation of marijuana, in violation of 21 U.S.C. § 841(a)(1), and possession of marijuana with the intent to distribute, in violation of 21 U.S.C. §§ 952 and 960.

Prior to trial, the government filed motions in limine asking the district court to admit petitioner's prior felony conviction as character evidence under Rule 404(b) and impeachment evidence under Rule 609(a)(1). Petitioner had a prior 1993 conviction for possession of methamphetamine. Id. The district court denied the motion to admit the prior conviction under Rule 404(b), but reserved ruling on the Rule 609(a)(1) basis. Id. On the morning of the first day of trial,

the court ruled that if petitioner testified on her own behalf, the prior conviction could be used to impeach her credibility pursuant to Rule 609(a)(1). Id.

Petitioner testified in her own defense. Id. During her direct examination, she admitted that she had previously been convicted of methamphetamine possession in 1993. Id. On cross-examination, the government inquired as to whether the prior conviction was a felony and petitioner responded affirmatively. Id. Subsequently, on re-direct examination, petitioner clarified that her prior conviction was for possession of methamphetamine for personal use, not possession of a distributable quantity of methamphetamine. Id. At the conclusion of a two-day trial, Ms. Ohler was convicted on b[illegible]h counts of the indictment.[1]

The Ninth Circuit did not reach the merits of petitioner's contention that the district court erred in its ruling admitting the prior conviction under Rule 609(a)(1). Id. at 1204. Instead, the Ninth Circuit held that petitioner had waived her right to challenge the district court's Rule 609(a)(1) ruling by introducing evidence of the conviction on direct examination. Id.

ARGUMENT

The Ninth Circuit's decision that petitioner waived her right to appeal the district court's Rule 609 ruling because she introduced evidence of her prior conviction during direct examination directly conflicts with the positions of two other circuits on the issue. This question appears with great regularity in both civil and criminal trials and is an issue that can substantially affect both the procedures and outcomes of said cases.

In United States v. Fisher, 106 F.3d 622 (5th Cir. 1997), the Fifth Circuit ruled in direct contrast to the Ninth Circuit's position in Ohler. In Fisher, the Fifth Circuit wrote:

---

[1] The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

> [W]e decline to agree that when opposing counsel obtains a ruling allowing it to introduce damaging evidence on cross, the affected party who attempts to anticipate that negative evidence waives his right to object to the introduction of that testimony itself by himself raising it . . . . A holding that, under these facts, a defendant who testifies in anticipation automatically waives his right to object to a trial court's ruling admitting the damaging evidence goes against basic notions of fairness.

Fisher, 106 F.3d at 629. The Second Circuit likewise has ruled that a defendant who "removes the sting" of a prior conviction does not waive his right to appeal the trial court's Rule 609 adverse ruling. In United States v. Puco, 453 F.2d 539 (2d Cir. 1971), the Second Circuit wrote:

> The government argues that Puco's referring to his prior conviction on direct examination . . . precludes him from contending on appeal that the trial judge abused his discretion. The record shows, however, that the trial judge ruled in advance of trial that, if Puco took the stand, the government could impeach him with his prior conviction. In view of this advance ruling, Puco was entitled to attempt to offset the prejudicial effect of admission of his prior conviction by referring to it before the government did . . . .

Puco, 453 F.2d at 541 n.6. Thus, two circuits have held directly in conflict with Ohler and the other circuits in accord with the Ninth Circuit on this issue.

Two other circuits, the Tenth and Eleventh, have not squarely held in contrast to Ohler but seem to have sided with the Fifth and Second Circuits by entertaining Rule 609 challenges in cases in which the defendant introduced the prior conviction during direct examination. See United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1993) (appeal challenging prior conviction admitted under Rule 609(a) that was first introduced on direct examination reviewed on its merits by court with no mention of waiver issue); United States v. Pritchard, 973 F.2d 905 (11th Cir. 1992) (same as to 609(b) conviction). To further add to the imprecision of this issue, the Third Circuit has expressly passed on deciding the Ohler issue, see United States v. Jacobs, 44 F.3d 1219 (3d Cir. 1995) (court explicitly neglected to address Ohler issue and resolved Rule 609 appeal on its merits),

and the Fourth and District of Columbia Circuits are silent as to this issue.

The circuits that have held that the introduction of a prior conviction on direct examination constitutes a waiver of the right to appeal the trial court's Rule 609 ruling generally have relied upon the proposition that a party that opens up a subject on direct examination should not then be able to challenge his opponent's pursuit of the issue. See United States v. Gaitan-Acevedo, 148 F.3d 577 (6th Cir.), cert. denied, Crehore v. United States, __ U.S. __, 119 S. Ct. 256 (1998); Gill v. Thomas, 83 F.3d 537, 541 (1st Cir. 1996) (in civil rights trial, defendant waived right to appeal Rule 609 ruling by himself introducing evidence of convictions); United States v. DePriest, 6 F.3d 1201, 1209 (7th Cir. 1993) (defendant waived appeal of court's Rule 608 determination by introducing evidence of notice of violation of release conditions during direct examination); United States v. Smiley, 997 F.2d 475, 479-80 (8th Cir. 1993) (Rule 609 appellate rights waived by introducing evidence of conviction on direct examination).

This Court already has significantly bounded the rights of defendants to appeal adverse Rule 609 determinations in Luce v. United States, 469 U.S. 38 (1984) by holding that "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." Id. at 43. Thus, if this Court allows the constriction of appellate rights set forth in Luce to be taken one step further, as has been done in the aforementioned circuits, the already limited appellate scheme associated with Rule 609 will be further diluted. As written by Weinstein and Berger:

> This seem[s] unduly harsh . . . [that] by introducing the evidence on direct . . . the right to challenge the admissibility ruling is waived. A defendant faced with an unfavorable [Rule 609] ruling ought to have to try to live with that ruling without surrendering the right to appeal it. These . . . holdings, coupled with the Luce decision, encourage trial judges to admit prior convictions, secure in the knowledge that reversal will rarely follow.

4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 609.04[2][e], at 609-34 (Joseph M McLaughlin, ed., Matthew Bender 2d ed. 1998).

In sum, this Court should grant the instant petition to give the circuits guidance in what is clearly a confused and divided question of law among the circuits. Such guidance is particularly necessary in this case, as this issue arises with great regularity in both the civil and criminal contexts and can represent a significant strategic and procedural component at trial. Moreover, a uniform rule as to this waiver issue also is necessary to allow courts, defendants, and plaintiffs to intelligently and knowingly proceed during trials in which Rule 609 evidence may be involved.

CONCLUSION

Because Ohler is directly in contrast with the Fifth and Second Circuits and this issue requires clarification among the circuits, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: June 7, 1999

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARIA SUZUKI OHLER, *Defendant-Appellant.*	No. 98-50282 D.C. No. CR-97-02278-JTM OPINION

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted March 2, 1999[1]
Pasadena, California

Filed March 9, 1999

Before: Alfred T. Goodwin, Melvin Brunetti, and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Criminal Law and Procedure/Evidence

The court of appeals affirmed a judgment of conviction. The court held that in a federal criminal prosecution, a defendant waives the right to appeal from an *in limine* ruling allow-

[1]The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) (2).

ing evidence of a prior conviction under Fed. R. Evid. 609(a) by admitting it during direct examination.

After passing through a port of entry from Mexico, appellant Maria Ohler was arrested when customs inspectors found 81 pounds of marijuana in her vehicle. An indictment charged her with smuggling marijuana and possession of marijuana with intent to distribute.

At trial, the government moved *in limine* to admit Ohler's conviction for possession of methamphetamine as character evidence under Fed. R. Evid. 404(b), and as impeachment under Rule 609(a)(1). The district court ruled that the prior would be admitted if Ohler testified.

Ohler testified in her own behalf, denying knowledge of the marijuana in the van she drove across the border. She claimed that the van had been taken without her permission, and that she had gone to Mexico to retrieve it. Ohler admitted on direct examination that she had been convicted of possessing methamphetamine, and on cross-examination that the offense was a felony. However, she explained on redirect that the drug quantity involved had been for personal use, rather than for distribution. A jury convicted Ohler as charged.

On appeal, Ohler contended that the district court erred prejudicially by ruling *in limine* that the evidence of her prior conviction would be admissible if she testified.

[1] When a criminal defendant introduces evidence of his prior conviction during direct examination, the defendant waives the right to appeal the district court's *in limine* ruling that the prior was admissible under Rule 609(a)(1).

[2] Ohler faced an adverse *in limine* ruling allowing the introduction of a prior conviction for impeachment purposes, and decided to introduce evidence of her prior during her direct examination to "remove the sting" of the prior. In doing

so, Ohler waived her right to appeal the district court's *in limine* ruling that her prior conviction was admissible under Rule 609(a)(1).

COUNSEL

Gary P. Burcham and Benjamin L. Coleman, Federal Defenders of San Diego, Inc., San Diego, California, for the defendant-appellant.

Jonah H. Goldstein, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

OPINION

BRUNETTI, Circuit Judge:

Maria Suzuki Ohler ("Ohler") appeals from a jury verdict finding her guilty of one count of importation of marijuana, in violation of 21 U.S.C. §§ 952 and 960, and one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Ohler contends that the district court erred when it concluded that evidence of her 1993 conviction for possession of methamphetamine was admissible under Rule 609(a)(1) of the Federal Rules of Evidence and granted the government's motion in limine. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Facts and Proceedings Below

Ohler attempted to enter the United States from Mexico through the San Ysidro, California, Port of Entry on July 29, 1997. As Ohler, the driver and sole occupant of a 1984 GMC van, passed through the port of entry, a customs inspector noticed that someone had tampered with one of the van's inte-

rior panels. Customs inspectors searched the van and discovered over eighty-one pounds of marijuana. Ohler was arrested and subsequently indicted on August 6, 1997, for importation of marijuana and possession of marijuana with intent to distribute.

Because Ohler had been previously convicted on February 13, 1993, for possession of methamphetamine, the government filed motions in limine asking the district court to admit Ohler's prior felony convictions as character evidence under Rule 404(b) and impeachment evidence under Rule 609(a)(1). The district court denied the government's motion in limine to admit Ohler's prior conviction as character evidence under Rule 404(b) and reserved ruling on whether the prior conviction was admissible for impeachment purposes under Rule 609(a)(1). On the morning of the first day of Ohler's trial, this district court concluded that, if Ohler were to testify on her own behalf, evidence of her past criminal conviction would be admissible under Rule 609(a)(1) to impeach her credibility.

After the government concluded its case-in-chief, Ohler testified in her own defense and denied that she had any knowledge of the marijuana discovered in the van. Specifically, she testified that the van had been taken without her permission the night before her arrest, that she had gone to Mexico simply to retrieve the van, and that she was arrested when she attempted to return to the United States. During her direct examination, Ohler admitted that she had been previously convicted of possession of methamphetamine in 1993. On cross-examination, the government asked Ohler if her prior possession conviction was a felony and Ohler answered affirmatively. Ohler then explained on redirect examination that her prior drug possession conviction was for possession of a personal use quantity rather than for possession of a distribution quantity.

At the conclusion of Ohler's two day trial, the jury found her guilty of importation of marijuana and possession of marijuana with intent to distribute. The district court sentenced Ohler to 30 months imprisonment and three years of supervised release and assessed a $200 penalty.

II. Discussion

[1] This Court has held that, when a criminal defendant introduces evidence of his prior conviction during his direct examination, the criminal defendant waives the right to appeal the district court's in limine ruling that the prior conviction was admissible under Rule 609(a)(1). *See United States v. Williams*, 939 F.2d 721, 725 (9th Cir. 1991); *Shorter v. United States*, 412 F.2d 428, 431 (9th Cir. 1969); *see also United States v. Bryan*, 534 F.2d 205, 206 (9th Cir. 1976) (no reversible error even if evidence of prior conviction is not admissible when defendant introduces prior conviction into evidence). Ohler attempts to circumvent the express holding of *Williams* by arguing that *Williams* is no longer applicable after the 1990 amendments to Rule 609(a)(1). Ohler's argument is without merit.

Before Rule 609 was amended in 1990, it read:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. 609 (amended 1990).

In 1990, the statutory limitation that a witness's prior conviction could only be introduced during cross examination to

impeach the witness's testimony was removed from Rule 609. The amended and current version of Rule 609(a) reads:

> (a) General Rule. For purposes of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

Fed. R. Evid. 609(a).

The Advisory Committee Note to Rule 609 explains why the limitation that a defendant's prior conviction could only be elicited during cross examination was removed from Rule 609. The Advisory Committee Note states:

> The amendment to Rule 609(a) makes two changes to the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to 'remove the sting' of the impeachment.

Fed. R. Evid. 609 advisory committee note. The advisory committee note demonstrates that, even prior to the 1990 amendments to Rule 609, a criminal defendant could introduce evidence of his prior convictions during his direct examination because most courts found the cross-examination limitation inapplicable. *See, e.g., United States v. Bad Cob*, 560 F.2d 877, 883 (8th Cir. 1977); *United States v. Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir. 1976).

Ohler contends that "as Rule 609(a)(1) now reads, there is no limitation as to who may introduce evidence of a prior conviction under Rule 609; if the defendant wishes to 'remove the sting' of Rule 609 evidence by bringing the conviction out on direct examination, such a strategy is statutorily sanctioned." Ohler, therefore, argues that, because the strategy of "removing the sting" is now statutorily sanctioned by Rule 609, a criminal defendant does not waive the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. Ohler's argument is meritless because even prior to the 1990 amendments to Rule 609 and this Court's decision in *Williams* a criminal defendant in this circuit could "remove the sting" of Rule 609 evidence by introducing evidence of his prior convictions during his direct examination.

This Court, in 1976, examined the text of former Rule 609 and recognized that the first sentence explicitly stated that evidence of a prior conviction could only be admitted if elicited from the witness or established by public record during cross-examination. *See Dixon*, 547 F.2d at 1082 n.2. Despite recognizing the cross-examination limitation in former Rule 609, this Court declared that "[i]t seems clear from the legislative history that on direct examination, *a party may elicit the evidence of a prior conviction from his own witness*; if the witness has forgotten or denies the existence of the conviction, the party may then introduce evidence of the conviction by public record, *even though this does not take place on cross-examination*." *Id.* (emphasis added). The Court reasoned that the purpose of the cross-examination limitation in

former Rule 609 was to insure that a prior conviction was not used to impeach a person who did not testify and that this purpose was not frustrated when a party elicited evidence of a prior conviction from his own witness during direct examination. *Id.*

Assuming, without deciding, that Ohler is correct in stating that Rule 609 now statutorily sanctions the "remove the sting" strategy that criminal defendants often employ, the 1990 amendments to Rule 609 do not reflect a true change in the law because, since at least this Court's decision in *Dixon*, a criminal defendant in this circuit has been allowed to introduce evidence of his prior criminal convictions during his direct examination. Therefore, when *Williams* was decided in 1991, a criminal defendant was explicitly allowed, despite the language of former Rule 609, to introduce evidence of his prior convictions during his direct examination. The 1990 amendments to Rule 609 do not affect the validity and/or applicability of the *Williams* decision because the "remove the sting" strategy has long been sanctioned by this Court and the 1990 amendments to Rule 609 only codify the law as it existed when *Williams* was decided.

This Court's decisions in *Dixon* and *Williams* do not stand alone. Other circuit courts have long recognized that a criminal defendant can introduce evidence of his prior convictions during his direct examination, *see, e.g., Bad Cob*, 560 F.2d at 883 ("The introduction by a witness himself, on his direct, of a prior conviction is a common trial tactic, recommended by textwriters on trial practice."), and have also held that a criminal defendant waives the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. *See, e.g., United States v. Gaitan-Acevedo*, 148 F.3d 577, 591-92 (6th Cir.), *cert. denied, Crehore v. United States*, 119 S. Ct. 256, *and rehearing denied*, 119 S. Ct. 457 (1998); *Gill v. Thomas*, 83 F.3d 537, 541 (1st Cir. 1996); *United States v. DePriest*, 6 F.3d 1201, 1209 (7th Cir. 1993); *United States v. Vega*, 776 F.2d 791, 792 (8th Cir. 1985). Furthermore, no circuit court has found it necessary to reexamine the waiver issue in light of the 1990 amendments of Rule 609. *See, e.g., United States v. Fisher*, 106 F.3d 622, 629 (5th Cir. 1997) (defendant does not waive right to appeal); *United States v. Smiley*, 997 F.2d 475, 479-80 (8th Cir. 1993) (defendant waives right to appeal); *United States v. Brown*, 956 F.2d 782, 787 (8th Cir. 1992) (same). These decisions reinforce the position of the advisory committee that the 1990 amendments to Rule 609 only removed a limitation that most courts already found inapplicable and support the conclusion that this Court's decision in *Williams* has not been disturbed by the 1990 amendments to Rule 609.

Ohler's reliance on the Fifth Circuit's decision in *Fisher* to support the argument that the 1990 amendments to Rule 609 represent a fundamental change in the law that affects this Court's decision in *Williams* is misplaced. The *Fisher* decision does not address the 1990 amendments to Rule 609. *See Fisher*, 106 F.3d at 629. It simply follows Fifth Circuit precedent that holds that a party does not waive the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. *Id.* (citing *Reyes v. Missouri Pac. R.R.*, 589 F.2d 791 (5th Cir. 1979)). Thus, the *Fisher* decision does not rely on the 1990 amendments to Rule 609 but relies on precedent that pre-dates 1990 to conclude that a defendant does not waive the right to appeal a district court's in limine ruling when the defendant introduces evidence of his prior convictions during his direct examination. *See id.* Just as the law of the Fifth Circuit has not been affected by the 1990 amendments to Rule 609, the law of this circuit and the *Williams* decision have not been altered by the 1990 amendments to Rule 609.

[2] Ohler argues that even if *Williams* is still good law, this case is distinguishable from *Williams* because the government in this case affirmatively moved to introduce the prior convic-

tion. This argument is wholly without merit and disingenuous. This case and *Williams* are indistinguishable. In *Williams*, "[t]he district court ruled *in limine* that the prosecution could admit into evidence for impeachment purposes under Rule 609(a)(1) Williams's prior state conviction for possession of marijuana for sale." *Williams*, 939 F.2d at 723. Here, Ohler faced the exact same situation as the defendant in *Williams*—an adverse in limine ruling allowing the introduction of a prior conviction for impeachment purposes—and she, like the defendant in *Williams*, decided to introduce evidence of her prior conviction during her direct examination to "remove the sting" of the prior conviction. In so doing, Ohler waived her right to appeal the district court's in limine ruling that her prior conviction was admissible under Rule 609(a)(1). *Williams*, 939 F.2d at 725.

Because Ohler waived her right to appeal the district court's in limine ruling, we need not decide whether the district court erred when it determined that Ohler's prior conviction for possession of methamphetamine was admissible for impeachment purposes under Rule 609(a)(1) of the Federal Rules Evidence.

AFFIRMED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARIA SUZUKI OHLER,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA,)
) ss:
COUNTY OF SAN DIEGO,)

Sylvia Enrique, being first duly sworn, deposes and says: That pursuant to Rule 29.4(a) of this Court served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT on the counsel for Respondent by enclosing a copy thereof in an envelope, First Class Postage Prepaid, addressed to:

The Honorable Drew S. Days, III , Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at San Diego, California on June 7, 1999.

SYLVIA ENRIQUE, Affiant

Subscribed and Sworn to before me
this 7th day of June 1999.

Notary Public in and for said
County and State.

(Seal)

Monica Maria Hernandez
COMM. # 1198083
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
COMM. EXP. OCT. 10, 2002

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARIA SUZUKI OHLER,

Petitioner,

- vs -

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Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA,)
) ss:
COUNTY OF SAN DIEGO,)

Sylvia Enrique, being first duly sworn, deposes and says: That pursuant to Rule 29.4(a) of this Court served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT on the counsel for Respondent by enclosing a copy thereof in an envelope, First Class Postage Prepaid, addressed to:

The Honorable Drew S. Days, III , Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at San Diego, California on June 7, 1999.

SYLVIA ENRIQUE, Affiant

Subscribed and Sworn to before me
this 7th day of June 1999.

Monica Maria Hernandez
Notary Public in and for said
County and State.

(Seal)

Monica Maria Hernandez
COMM. # 1186083
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
COMM. EXP. OCT. 10, 2002

ORIGINAL

No. 98-9828

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

MARIA SUZUKI OHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
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QUESTION PRESENTED

Whether petitioner waived the right to challenge on appeal the district court's in limine ruling that her prior conviction could be admitted as impeachment evidence if she testified at trial.

IN THE SUPREME COURT OF THE UNITED STATES

No. 98-9828

MARIA SUZUKI OHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 169 F.3d 1200.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1999. The petition for a writ of certiorari was filed on June 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of importing marijuana, in violation of 21 U.S.C. 952 and 960, and one count of possessing marijuana with intent to

distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 30 months' imprisonment to be followed by three years' supervised release. The court of appeals affirmed. Gov't C.A. Br. 2; Pet. App. 5, 10.

1. On July 29, 1997, petitioner attempted to enter the United States from Mexico through the port of entry at San Ysidro, California. Petitioner was the driver and sole occupant of a 1984 GMC van, which was later found to be registered in her name. A customs inspector noticed that someone had tampered with one of the van's interior panels. A subsequent search of the van uncovered more than 80 pounds of marijuana. Petitioner was arrested and subsequently indicted for importation of marijuana and possession of marijuana with intent to distribute it. Gov't C.A. Br. 3-4; Pet. App. 3-4.

The government filed motions in limine asking the district court to admit petitioner's 1993 felony conviction for possession of methamphetamine under Federal Rules of Evidence 404(b) and Federal Rule of Evidence 609(a)(1).[1] At a pretrial hearing, the court denied the motion to admit the conviction as substantive evidence under Rule 404(b) and reserved ruling on the motion to admit the conviction as impeachment evidence under Rule 609(a)(1). In ruling on another motion in limine, the court assured counsel

[1] Rule 609(a)(1) provides, in relevant part, that "evidence that an accused has been convicted of [] a crime [punishable by death or imprisonment in excess of one year] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Fed. R. Evid. 609(a)(1).

that [y]ou can always revisit the issue at trial." The court added that "[n]o ruling I make is with prejudice; I always keep an open mind." Pet. App. 4; 1/26/98 Tr. 35.

On the morning that trial was to begin, before the jury was selected, the court ruled in limine that, if petitioner testified, the government could use her prior conviction to impeach her. The court concluded that the probative value of the conviction outweighed any prejudice to petitioner from its admission. Gov't C.A. Br. 4-5; Pet. App. 4.

Late that afternoon, after the government had presented its case in chief and petitioner had presented her first witness, petitioner testified in her own defense. She raised no objection, either before or during her testimony, to the admission of her prior conviction. On direct examination, petitioner denied any knowledge of the marijuana discovered in the van. She claimed that the van had been taken to Mexico without her permission and that she had gone to Mexico simply to retrieve the van. She further testified that she had been convicted of possession of methamphetamine in 1993. Gov't C.A. Br. 6; Pet. App. 4.

On cross-examination, the government asked petitioner whether her prior conviction was for a felony, and petitioner responded that it was. On redirect examination, petitioner explained that the conviction was for possession of "a personal use quantity" of methamphetamine rather than "a distribution quantity." Pet. App. 4.

2. The court of appeals affirmed. Petitioner argued on

appeal that the district court abused its discretion in granting the government's in limine motion to admit evidence of her prior felony conviction under Rule 609(a)(1). The court of appeals declined to reach that argument. The court, relying on circuit precedent, held that "when a criminal defendant introduces evidence of his prior conviction during his direct examination, the criminal defendant waives the right to appeal the district court's in limine ruling that the prior conviction was admissible under Rule 609(a)(1)." Pet. App. 5.

ARGUMENT

Petitioner contends that the court of appeals erred in holding that, by testifying about her prior felony conviction on direct examination, she waived her right to challenge the district court's in limine ruling that the government could impeach her with the conviction. The court of appeals' decision is consistent with the reasoning of Luce v. United States, 469 U.S. 38 (1984), and with the holdings of three other circuits. While there is some tension in the courts of appeals on this general issue, the decision does not present a direct circuit conflict that warrants the Court's review in the context of this case.

1. The court of appeals' decision is correct. In Luce, the district court ruled in limine that, if the defendant testified at trial, the government could use his prior conviction to impeach him under Federal Rule of Evidence 609(a)(1). The defendant did not testify. He then sought to challenge the district court's in limine ruling on appeal. The court of appeals refused to consider

the defendant's challenge and this Court affirmed, holding that, in order to preserve for review a challenge to an in limine ruling allowing the use of a prior conviction for impeachment purposes under Rule 609(a)(1), a defendant must testify at trial. 469 U.S. at 43.

The Court's holding in Luce rested largely on its conclusion that in limine rulings on whether a prior conviction may be admitted for impeachment purposes under Rule 609(a)(1) are not final rulings on admissibility. As the Court explained:

> Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling.

469 U.S. at 41-42.

The Court also observed that a reviewing court in such circumstances "has no way of knowing whether the Government would have sought to impeach with the prior conviction." 469 U.S. at 42. "If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means," the Court explained, "the prosecutor might elect not to use an arguably inadmissible prior conviction." Ibid.

This Court's reasoning in Luce supports the court of appeals' holding in this case that, by testifying to her prior conviction on direct examination, petitioner waived her right to appeal the in limine ruling allowing the conviction as impeachment evidence. As the same court of appeals explained in an earlier decision on the

issue:

> Luce teaches that the admissibility of a prior conviction for impeachment depends to a great extent on the nature of the defendant's testimony. In practice, it is often difficult to determine in advance of this testimony whether the use of such a powerful form of impeachment is justified. * * * Even if the district court rules before trial that the prior conviction will be admissible if offered, based on the defendant's expected defense, it is always possible that the court will change its mind on hearing the defendant's actual testimony. The district court should retain discretion to reverse itself when this testimony brings into sharper focus the question of admissibility.

United States v. Williams, 939 F.2d 721, 725 (9th Cir. 1991). The court added that a rule that a defendant cannot testify on direct examination about a prior conviction and still challenge on appeal a pretrial ruling allowing the admission of the conviction is also consistent with "[a]nother lesson of Luce": that "the government should be free to decide against introducing a prior conviction when, for example, it appears later at trial that there is less need to impeach the defendant than previously thought, or that there are other less problematic means of impeachment available." Ibid.

Here, petitioner, in preemptively testifying about her prior conviction on direct examination, deprived the district court of the opportunity to perform the balancing of probative value and prejudicial effect that Rule 609(a)(1) requires in light of the testimony actually presented at trial. Petitioner also deprived the government of the opportunity to decide whether to use the conviction as impeachment. Petitioner thereby waived her right to challenge the in limine ruling on appeal. While such a holding results in a defendant's having to choose between preserving a Rule

609(a)(1) objection for appeal and attempting to soften the blow of damaging information by introducing it on direct examination, defendants have to make similar strategic decisions throughout the course of a trial. Cf. United States v. Mezzanatto, 514 U.S. 196, 209 (1995) (observing that the choice faced by the criminal defendant in that case -- whether to accept the government's condition for engaging in plea negotiations that he waive the exclusionary provisions of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) -- was "indistinguishable from any of a number of difficult choices that criminal defendants face every day"). A contrary conclusion "would in effect be licensing defendants to plant irremediable errors in their trials during direct examination," by testifying to convictions that the district court might have excluded based on the evidence at trial or that the government might have chosen not to use. Williams, 939 F.2d at 725.

2. Petitioner acknowledges (Pet. 5) that the First, Sixth, and Eighth Circuits, like the Ninth Circuit, have held that a litigant waives his right to appeal an adverse in limine ruling that a prior conviction may be admitted for impeachment purposes under Rule 609(a)(1) if the litigant testifies to the conviction on direct examination. See, e.g., Gill v. Thomas, 83 F.3d 537, 540-541 (1st Cir. 1996); United States v. Gaitan-Acevedo, 148 F.3d 577, 592 (6th Cir.), cert. denied, 119 S. Ct. 256 (1998); United States v. Smiley, 997 F.2d 475, 480 (8th Cir. 1993). Petitioner contends (Pet. 3-4), however, that the decision below conflicts with United

States v. Puco, 453 F.2d 539, 541 n.6 (2d Cir. 1971), and United States v. Fisher, 106 F.3d 622 (5th Cir. 1977), both of which allowed a defendant to challenge on appeal an in limine ruling that his prior conviction could be introduced for impeachment purposes, even though the defendant testified about the conviction on direct examination. While there is some disagreement in the courts of appeals on the general issue raised by petitioner, there is no square conflict that merits this Court's review.

The Second Circuit decided Puco 13 years before this Court decided Luce. The Second Circuit, citing Luce, has since recognized that "[a]n in limine evidentiary ruling does not constitute a final ruling on admissibility," Palmieri v. Defaria, 88 F.3d 136, 139 (1996), particularly with respect to rulings that "relevant evidence is unduly prejudicial," which "must be resolved in the developed context of trial," Rosenfeld v. Basquiat, 78 F.3d 84, 90 (1996). The continuing vitality of Puce in the Second Circuit is therefore uncertain.

The Fifth Circuit's decision in Fisher dealt with circumstances unlike those in the present case (or, for that matter, any other case applying a similar waiver rule). In Fisher, after the defendant's state court conviction was introduced at his federal trial, the Texas Supreme Court held that the conviction was constitutionally invalid. The Fifth Circuit's actual holding in Fisher was explicitly limited to those circumstances. See 106 F.3d at 629 ("Therefore, when the prosecution obtains, over objection, a ruling in limine that it may use evidence of an earlier

conviction if the defendant testifies, the defendant who introduces evidence of the conviction, later found to be constitutionally infirm, in direct examination in an effort to ameliorate the highly prejudicial effect of that evidence, should not be deemed to have waived objection to the erroneous introduction of such evidence.") (emphasis added).[2] In any event, in rejecting the waiver argument in Fisher, the Fifth Circuit simply adhered to pre-Luce circuit precedent, without addressing whether that precedent might be undermined by this Court's reasoning in Luce. See 106 F.3d at 629 (citing Reyes v. Missouri Pacific R.R. Co., 589 F.2d 791 (5th Cir. 1979)).[3] And at least one Fifth Circuit decision since Luce appears to have taken a contrary approach. See United States v. Galvan-Garcia, 872 F.2d 638, 640 (5th Cir. 1989) (where the defendant had filed a pretrial motion seeking to exclude evidence of a prior conviction but then "introduced, through his own testimony on direct examination, evidence of his prior conviction," the defendant "cannot now complain of the introduction of the prior conviction into evidence when he himself initially presented the

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[2] This Court intimated in Luce that, where a district court's in limine ruling involves a question of "constitutional dimensions," a different rule with respect to reviewability may be warranted. See 469 U.S. at 42-43.

[3] In addition to Fisher, the only Fifth Circuit decision cited by petitioner, at least two other post-Luce Fifth Circuit decisions have allowed a party to challenge an in limine ruling that a prior conviction may be used for impeachment, although the party volunteered the conviction in his opening statement or on direct examination. See Coursey v. Broadhurst, 888 F.2d 338, 341 n.3 (1989); Petty v. Ideco, 761 F.2d 1146, 1152 n.3 (1985). In both Coursey and Petty, as in Fisher, the court simply adhered to Reyes without acknowledging Luce.

evidence to the jury").

Petitioner also contends (Pet. 4) that two decisions of the Tenth and Eleventh Circuits, while not squarely on point, "seem to have sided" with Puco and Fisher. Petitioner is mistaken.

In United States v. Mejia-Alarcon, 995 F.2d 982, 987 (10th Cir.), cert. denied, 510 U.S. 927 (1993), the court of appeals held that an in limine ruling that a prior conviction qualified as a crime of dishonesty under Rule 609(a)(2) -- which the court characterized as "an evidentiary issue akin to a question of law" -- was sufficiently final that the defendant did not have to preserve an objection by renewing his challenge at trial. In so ruling, however, the court expressly distinguished in limine rulings, such as the one in this case, allowing a prior conviction as impeachment evidence under Rule 609(a)(1). The court explained that a determination as to the admissibility of a prior conviction under Rule 609(a)(1) cannot be made definitively before trial, because the determination "rests on a balancing of the probative value and prejudicial effect of the conviction -- a balancing that could only properly be performed after an assessment of the evidence that had come in up to the point of its admission." Id. at 987 n.2.[4]

[4] See also United States v. Martinez, 76 F.3d 1145, 1152 (10th Cir. 1996) (holding that the defendant waived his right to object to the admission of his prior convictions, where the district court declined to rule on the admissibility of the convictions under Rule 609(a)(1) until after the defendant testified, and the defendant acknowledged the convictions on direct examination to "draw the sting" in the event that the court allowed them as impeachment evidence)

The Eleventh Circuit has taken no position on the particular question presented in this case. In United States v. Pritchard, 973 F.2d 905, 908 (1992), the case relied on by petitioner, the court of appeals considered a defendant's challenge to an in limine ruling allowing a prior conviction to be used as impeachment evidence, where the defendant then testified to the conviction on direct examination. But there is no indication that the government argued to the court of appeals that the defendant had waived his challenge by so testifying or that the court considered the issue.[5]

Since the petition for certiorari was filed, the en banc Seventh Circuit decided Wilson v. Williams, No. 97-2637, 1999 WL 432591 (June 29, 1999). In Wilson, the court of appeals declined to adopt the rule that "a litigant who loses an evidentiary ruling and then offers the evidence himself has waived any opportunity to complain about the decision in limine," Id. at *4. The court

[5] In Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997), a tort action against a former sexual partner for wrongful transmission of genital herpes, the district court denied the plaintiff's motion in limine to exclude evidence of her sexual history. The plaintiff, after renewing her challenge at trial, then testified about her sexual history on direct examination. The court of appeals recognized that, "as a general proposition, an overruled motion in limine does not preserve a party's objection for purposes of appeal." Id. at 1342. The court, however, relied on the decision of "our predecessor circuit" in Reyes, 589 F.2d at 793 n.2, as recognizing an exception to that rule where "the movant, as a matter of trial strategy, presented the objectionable evidence himself on direct examination to minimize its prejudicial effect." 105 F.3d at 1342. Thus, the Eleventh Circuit in Judd, like the Fifth Circuit in Fisher, simply followed pre-Luce circuit precedent, without considering whether that precedent was undermined by Luce. The court's discussion of whether the plaintiff's objection was preserved was not essential to the outcome of the case, because the court ultimately held that the district court had not abused its discretion in admitting the evidence. 105 F.3d at 1343.

recognized that such a rule had been adopted by the First and Ninth Circuits. Ibid. (citing United States v. Williams and Gill v. Thomas).

The court of appeals then proceeded to discuss whether, or in what circumstances, a party may seek appellate review of an adverse ruling in limine if the party did not renew its objection at trial. The court distinguished between a "conditional, contingent, or tentative ruling" in limine, which requires a party to object at trial in order to preserve the issue for appeal, and "a definitive ruling in limine," which "preserves an issue for appellate review, without the need for later objection." 1999 WL 432591, at *1, *3.

Under the Seventh Circuit's analysis, the district court's in limine ruling allowing the admission of petitioner's prior conviction might be regarded as "conditional, contingent, or tentative." The district court's ruling was explicitly conditioned on petitioner's testifying at trial, stating that, "if the defendant takes the stand, she should be capable of being impeached" with her prior conviction. 1/28/98 Tr. 14; cf. Wilson, 1999 WL 432591, at *3 ("One good example of a conditional ruling is a judge's statement that, if a litigant testifies, then the adverse party will be entitled to cross-examine in such-and-such a way."). The district court's ruling was also necessarily tentative, given that in limine rulings allowing the admission of prior convictions under Rule 609(a)(1), which requires a weighing of probative value against prejudicial effect, are "subject to change when the case unfolds, particularly if the actual testimony differs from what was

contained in the defendant's proffer." Luce, 469 U.S. at 41. Indeed, in discussing another of its in limine rulings in this case, which similarly required a balancing of the probative value of proposed evidence against its prejudicial effect, the district court explained to counsel that "[y]ou can always revisit the issue" during trial. 1/26/98 Tr. 35. The court added that "[n]o ruling I make is with prejudice; I always keep an open mind." Ibid. Accordingly, to the extent that the district court's in limine ruling was viewed as "conditional, contingent, or tentative," the Seventh Circuit, like the Ninth Circuit, would hold that petitioner had not preserved her challenge to that ruling for appeal.

3. There is an additional reason why this Court's review is not warranted in this case: Petitioner would not have been entitled to reversal of her conviction even if the Ninth Circuit had considered her claim on the merits. Indeed, given the standard under which courts of appeals review the admission of prior convictions under Rule 609(a)(1), the same could be said in most cases in which the waiver rule has been applied.

Rule 609 provides that evidence of a prior felony conviction that is less than ten years old, as is petitioner's prior felony conviction, is admissible to attack a witness's credibility if its probative value outweighs its prejudicial effect.[6] The Ninth

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[6] A felony conviction is not admissible if more than ten years have elapsed since the date of conviction or the date of release from incarceration for the conviction, whichever is later, unless "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and

Circuit, consistent with other circuits, has directed district courts to consider a variety of factors in conducting the balancing analysis mandated by Rule 609(a)(1): "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility." United States v. Browne, 829 F.2d 760, 762-763 (9th Cir. 1987), cert. denied, 485 U.S. 991 (1988); accord, e.g., Pritchard, 973 F.2d at 908-909; United States v. Sloman, 909 F.2d 176, 181 (6th Cir. 1990); Gordon, v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.). A district court's decision to admit a conviction, after an analysis of those factors, is reviewable only for an abuse of discretion. Browne, 829 F.2d at 762.

The district court did not abuse its discretion in this case in holding that petitioner's prior conviction was admissible if she testified at trial.

First, as for the impeachment value of petitioner's prior conviction, the Ninth Circuit has concluded that "prior convictions for drug offenses are probative of veracity." United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997); accord United States v. Alexander, 48 F.3d 1477, 1488 (9th Cir.), cert. denied, 516 U.S. 878 (1995). The district court's conclusion that petitioner's methamphetamine possession conviction had "some impeachment value"

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circumstances substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b).

(1/28/98 Tr. 13) thus was adequately supported by circuit precedent.

Second, as for the time of the prior conviction, the Ninth Circuit has recognized that even convictions that are ten years old are "not impermissibly stale." Cordoba, 104 F.3d at 229; see also United States v. Givens, 767 F.2d 564, 579-580 (9th Cir.) (upholding admission of eight-year-old conviction), cert. denied, 474 U.S. 953 (1985). In light of those authorities, the district court was entitled to conclude that petitioner's conviction, which occurred within five years of her trial, was "not so remote so as to create undue prejudice" (1/28/98 Tr. 13).

Third, as for whether the prior conviction is so similar to the crime charged that the jury will improperly conclude that "because [the defendant] did it before, he must have done it again," Browne, 829 F.2d at 763, petitioner's prior conviction involved a different illegal drug, a different quantity of the drug (i.e., a personal use quantity versus a distribution quantity), and a different sort of activity (i.e., simple possession versus smuggling and possession with intent to distribute). The district court took into account those differences, noting, for example, that "the prior conviction is for mere use whereas the charge is a smuggling charge" (1/28/98 Tr. 13).

Finally, as for the remaining Brown factors concerning the importance of the defendant's testimony and the centrality of the defendant's credibility, the Ninth Circuit has repeatedly upheld the admission of prior convictions where the defendant's

credibility was critical to the disputed issues at trial. See, e.g., Givens, 767 F.2d at 580 (the district court did not abuse its discretion in concluding that the defendant's prior convictions were admissible, where the defendant's "proposed testimony in which he would have denied committing the offense, would have placed his credibility directly at issue"); Browne, 829 F.2d at 764 (where the defendant testified that he did not commit the crime and had an alibi, the district court did not abuse its discretion in admitting the defendant's prior conviction). The district court permissibly concluded (1/28/98 Tr. 13-14) that the centrality of petitioner's credibility tipped the balance in favor of the admissibility of her prior conviction. It was expected that petitioner would testify at trial that she had no knowledge of the large quantity of marijuana that was found in her van. Such testimony would place petitioner's credibility directly at issue to the same extent as did the defendants' testimony in Givens and Browne.

In sum, if the Court were to grant the petition and conclude that the Ninth Circuit erred in holding that petitioner had waived her right to challenge the district court's in limine ruling on appeal, the district court's ruling on the merits should nevertheless be affirmed. The Court's resolution of the question presented in the petition, therefore, would not alter the ultimate outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1999

IN THE SUPREME COURT OF THE UNITED STATES

OHLER, MARIA SUZUKI
Petitioner

vs.

USA

No. 98-9828

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** via Federal Express, on this 1st day of September 1999.

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OCTOBER TERM, 1999

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- vs -

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES

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> No person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment 17

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

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Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES

Petitioner, Maria Suzuki Ohler, respectfully submits this reply to the Brief for the United States in Opposition ("OB") to her petition for a writ of certiorari. Despite the government's contentions, the instant petition raises an issue which is the subject of a "square" conflict among the federal courts of appeal. Moreover, this case provides an excellent vehicle for resolving this conflict.

BACKGROUND

The government accurately portrays the factual and procedural background of the case; however, petitioner wishes to set forth the district court proceedings in a bit more detail so as to clarify a few points.

Two weeks before trial, on January 13, 1998, the government filed a motion in limine to admit petitioner's 1993 conviction for possession of methamphetamine under Rule 609(a)(1). CR 23; ER at 11-13.[1] The motion in limine stated: "The Government hereby notifies Defendant of its intention to offer the following conviction at trial under Federal Rule of Evidence 609(a)(1): Defendant was convicted of the felony offense of Possession of a Controlled Substance, in violation of California Health and Safety Code Section 11377(A), on June 29, 1993, and sentenced to 90 days jail and three years probation. Therefore, if Defendant testifies, the Government intends to use this conviction to impeach her." CR 23; ER at 11. One week later, on January 20, 1998, petitioner filed a written submission in which she objected to the government's motion in limine. CR 24; ER at 34.

On January 26, 1998, the district court held a hearing to resolve the various motions in limine that had been filed. CR 27; ER at 66. At that time, petitioner again "object[ed] to the use of th[e] prior conviction under [Rule] 609." ER at 91. In response, the government argued that use of the prior conviction to impeach petitioner was "something that's important and critical to the Government's case . . . ." ER at 93. The district court deferred ruling on the motion so that the parties could submit supplemental briefing. ER at 97. Also at the hearing, in denying one of the government's other requests, the district court did tell the prosecutor that it could revisit that other

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[1] "CR" refers to the Clerk's Record and is followed by the entry number of the cited document as it appears in the district court docket sheets. The district court docket sheets appear on pages 267-74 of the Excerpts of Record ("ER") submitted by petitioner to the United States Court of Appeals for the Ninth Circuit.

particular issue and that it "always keep[s] an open mind." ER at 100.

On January 27, 1998, petitioner filed a supplemental brief in which she continued to object to the government's request to admit her prior conviction under Rule 609. CR 29; ER at 41, 44-46. The government also filed a supplemental brief. CR 30; ER at 59-65. Trial began the next day, January 28, 1998. ER at 103. At the beginning of the proceedings, the district court entertained further argument on the Rule 609 issue. ER at 108-14. Petitioner continued to object to the admission of her prior conviction under Rule 609. Id.

After two sets of briefing and two rounds of oral argument, the district court finally stated: "All right. I think I've heard the arguments at this point . . . I do think we do need to get this issue resolved." ER at 114-15 (emphasis added). The district court then definitively held that petitioner's prior conviction was admissible under Rule 609 with an explanation that amounted to almost two pages of transcript and never once indicated that it was subject to reconsideration. ER at 115-16. At the outset of its ruling, the district court commented: "Well, I will say at the threshold that this is a very close call. You may not see it as such, but it is a close call." ER at 115. The district court was troubled as to whether drug crimes involving simple possession, as opposed to distribution, are probative of veracity for purposes of Rule 609 and seemed to want some guidance from the Ninth Circuit, as it queried: "Perhaps one day we will get a refinement of [United States v.] Alexander[, 48 F.3d 1477, 1488 (9th Cir. 1995)] and perhaps a distinction, if a distinction is to be made, between personal use convictions and other types of drug convictions." ER at 115. Nevertheless, the district court firmly ruled that the conviction was admissible. Petitioner ultimately testified in her own defense and admitted the prior conviction on direct examination to remove the sting of the imminent cross-examination.

This background clarifies a few important considerations. First, at one point in its

brief, the government asserts that petitioner "raised no objection, either before or during her testimony, to the admission of her prior conviction." OB at 3 (emphasis added). Petitioner assumes that the use of the word "before" means immediately before her testimony, as the above background clearly demonstrates that petitioner fiercely litigated the Rule 609 issue before trial. Admittedly, petitioner did not renew her objection immediately before her testimony, but that was because the district court had definitively ruled on the issue. Indeed, despite the government's effort to cast the decision as tentative or subject to change by claiming that the district court "always ke[pt] an open mind[,]" OB at 3, the district court prefaced its definitive Rule 609 ruling by stating, "I do think we do need to get this issue resolved." ER at 115. The district court then did just that; it definitively resolved the issue.

In addition, given the posture of the Rule 609 issue, there was no doubt that the government intended to introduce the prior conviction to impeach petitioner. The government initially raised the issue by affirmatively moving to admit the conviction and vigorously argued for its admission in two sets of papers and two rounds of oral argument. At no point during all of this argument did the government indicate that it was uncertain as to whether it would admit the conviction if given permission. To the contrary, the government emphasized that use of the conviction to impeach petitioner was something that was "important and critical" to its case. ER at 93.

ARGUMENT

The government essentially makes three arguments as to why the petition for a writ of certiorari should be denied: (1) the Ninth Circuit's decision that petitioner could not appeal the district court's pretrial decision to allow the government to impeach her with her prior conviction under Rule 609 because she testified about the conviction on direct examination is in accord with

the Court's decision in Luce v. United States, 469 U.S. 38 (1984); (2) while there is some "tension" among the courts of appeal regarding the Ninth Circuit's refusal to entertain the merits of the district court's Rule 609 ruling under these circumstances, there is not a "direct circuit conflict" warranting clarification; and (3) even if the Ninth Circuit had entertained the merits of the Rule 609 ruling, it would have affirmed the district court. Petitioner will respond to the government's contentions in order.

I.

In Luce, a criminal defendant, Luce, "moved for a ruling to preclude the Government from using a 1974 state conviction to impeach him if he testified. There was no commitment by [Luce] that he would testify if the motion were granted, nor did he make a proffer to the court as to what his testimony would be." Luce, 469 U.S. at 39.[2] The district court denied his motion but explained "that the nature and scope of [Luce's] trial testimony could affect [its] specific evidentiary rulings; for example, the [district] court was prepared to hold that the prior conviction would be excluded if [Luce] limited his testimony to explaining his attempt to flee from the arresting officers. However, if [Luce] took the stand and denied any prior involvement with drugs, he could then be impeached by the 1974 conviction." Id. at 40. Luce did not testify and, after losing at trial, attempted to appeal the district court's Rule 609 ruling. Id. The court of appeals refused to entertain the merits of his claim, and the Court affirmed. Id.

In explaining its affirmance, the Court's leading rationale was that an appellate court is "handicapped" in reviewing such an evidentiary claim without the factual context of the

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[2] It is not entirely clear whether Luce's motion was made before trial or during trial. The Court, however, characterized the motion as a motion in limine, using that "term in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." Id. at 40 n.2.

defendant's testimony. Id. at 41. In particular, the Court explained that a reviewing court cannot determine whether any evidentiary error that may have been committed in admitting the prior conviction was harmless. Id. at 42.[3] Clearly, this leading rationale is not applicable in this instance. Here, petitioner testified at trial, and thus there is a full record, or a complete factual context, by which a reviewing court can conduct appellate review of the evidentiary ruling.

As a secondary, case-specific rationale, the Court also explained that an appeal should not lie because an in limine "ruling is subject to change when the case unfolds" and "[o]n a record such as here, it would be a matter of conjecture whether the District Court would have allowed the Government to attack [Luce's] credibility at trial by means of the prior conviction." Id. at 41-42 (emphasis added). Similarly, the Court reasoned that a "reviewing court also has no way of knowing whether the Government would have sought to impeach with the prior conviction. If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction." Id. at 42. These case-specific reasons are not applicable in this instance. First, the district court definitively ruled that petitioner's prior conviction was admissible and did not in any way indicate that its ruling could change. In fact, the district court believed that it "needed" to resolve the issue when it did, on the morning of the first day of trial. In other words, rather than wanting to wait to decide the issue, the district court wanted to make a clear and immediate ruling. Second, there was no doubt that the government intended to use the prior conviction in this case, as the government affirmatively moved to admit petitioner's prior conviction (as opposed to Luce, who moved to exclude his). In addition,

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[3] The Court noted that allowing a defendant to make a proffer as to what his testimony would be does not solve this problem because "his trial testimony could, for any number of reasons, differ from the proffer." Id. at 41 n.5.

in the four sets of written and oral arguments made by the government, it never expressed any doubt about its intention to use the conviction and even characterized use of the prior conviction as important and critical to its case.

Perhaps more importantly, the secondary, case-specific concerns articulated in Luce can easily be allayed under the instant circumstances without the drastic solution of an appellate waiver. Indeed, Professor Saltzburg has offered a practical, easy solution:

> A Trial Judge justifiably might wish to hear the defendant's direct testimony before ruling finally on the scope of impeachment. The Trial Judge can do this, however, without putting the defense to the unfair choice describe above [introducing a prior conviction that may not be admitted or appearing as if it is hiding facts from the jury] by reserving a final ruling until near the end of the defendant's direct examination. At that point, the Judge can inquire of the government as to whether it still intends to use prior convictions and can rule finally on their admissibility. If the government chooses to forego their use, they need not be mentioned. If, however, the government expresses an intent to offer them, they should be available to the defense to offer, without waiver of the right to appeal, so that the defendant may avoid an adverse reaction from the jury if it learns of the convictions only after the defense has passed the witness.

1 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual, at 37 (7th ed. 1998).[4] For these reasons, while a defendant's failure to testify may be cause for an appellate waiver of a Rule 609 ruling, the situation presented by the instant petition is not. In short, despite the government's contentions, the Court's reasoning in Luce does not support the Ninth Circuit's decision in this case.

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[4] Of course, the scenario described by Professor Saltzburg did not occur here, but that was because the district court made a definitive ruling without expressing a desire to hear petitioner's testimony first, and the government had already made its intention to introduce the conviction clear.

II.

A "compelling reason" exists to grant a petition for a writ of certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ." Sup. Ct. R. 10(a). The government does not contend that the issue raised by petitioner is not an "important matter" and also acknowledges that "there is some disagreement in the courts of appeals" on the issue. OB at 8. The government, however, claims that "there is no square conflict that merits this Court's review." Id. (emphasis added). Although the "disagreement" acknowledged by the government should be enough to merit the granting of the instant petition, there is nonetheless a "square" circuit-split, despite the government's contention, warranting review. Indeed, within the last two years, the Fifth and Seventh Circuits have rendered decisions that "squarely" conflict with the Ninth Circuit's decision in the instant case. See Wilson v. Williams, 182 F.3d 562, 566-67 (7th Cir. 1999) (en banc); United States v. Fisher, 106 F.3d 622, 629 (5th Cir. 1997).

Most recently, in Wilson, the Seventh Circuit specifically rejected the rule articulated by the Ninth Circuit in this instance and held that a litigant does not waive an adverse decision on a Rule 609 in limine motion by attempting to remove the sting of the ruling by informing the jury of the prior conviction. Judge Easterbrook, writing for an en banc Seventh Circuit, explained:

> Trial-time adaptions are benefits of pretrial rulings on evidence, so it follows that adaptions do not waive positions already staked out. Plaintiff did not surrender his objection by making the best he could of his situation after the judge's adverse ruling. See Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997). Although some courts have held that a litigant who loses an evidentiary ruling and then offers the evidence himself has waived an opportunity to complain about the decision in limine, see United States v. Williams, 939 F.2d 721, 723 (9th Cir. 1991); Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996), this approach gives up one of the principal benefits of the pretrial-ruling procedure, and we therefore do not follow it.

Wilson, 182 F.3d at 566 (emphasis added). The emphasized language cannot be more of an indication that the Seventh Circuit rejected the Ninth Circuit's approach and thereby created a "square" conflict.[5]

The government attempts to blunt the "square" conflict by arguing that the Seventh Circuit's rejection of the Ninth Circuit's appellate waiver rule only applies to definitive rulings. The government also claims that the district court's ruling in this case was tentative, and therefore the instant case does not generate a "square" conflict with the Seventh Circuit. As has already been explained, the government's factual assertion is simply wrong -- the district court wanted to make a definitive pretrial ruling and did make such a ruling. More importantly, the state of the law in the Ninth Circuit, as articulated in Williams and Ohler, is that even if a district court makes a definitive Rule 609 ruling, a litigant cannot appeal the decision if he attempts to remove the sting. Indeed, the Ninth Circuit, in describing the district court's decision in the instant case, did not indicate any tentativeness: "On the morning of the first day of [petitioner's] trial, th[e] district court concluded that, if [petitioner] were to testify on her own behalf, evidence of her past criminal conviction would be admissible under Rule 609(a)(1) to impeach her credibility." Ohler, 169 F.3d at 1201. The bottom line is this: in the Ninth Circuit, under Ohler, even if a district court makes a definitive decision to allow a prior conviction to be introduced under Rule 609, a litigant waives the right to appeal that decision if he attempts to remove its sting. This rule "squarely" conflicts with the Seventh Circuit.[6]

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[5] While the Seventh Circuit did not cite United States v. Ohler, 169 F.3d 1200 (9th Cir. 1999), the Ninth Circuit's decision underlying the instant petition, it did cite the Ninth Circuit's decision in Williams, which stood as the basis for Ohler.

[6] The government also contends that this case does not present a "square" conflict because the Seventh Circuit only allows a litigant to appeal after he removes the sting of an

Not only does the Ninth Circuit's rule "squarely" conflict with the Seventh Circuit, it also "squarely" conflicts with the Fifth Circuit. In Fisher, the Fifth Circuit, like the Seventh Circuit, explicitly rejected the appellate waiver rule articulated by the Ninth Circuit in Williams, and later in Ohler, and explained:

> [The government] first argues [defendant] waived his right to appeal the use of the conviction since he introduced it in direct examination, relying on United States v. Williams, 939 F.2d 721 (9th Cir. 1991), Shorter v. United States, 412 F.2d 428 (9th Cir. 1969), cert. denied, 396 U.S. 970 (1969), and United States v. Cobb, 588 F.2d 607, 613 (8th Cir. 1978), cert. denied, 440 U.S. 947 (1979).
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> However, the Fifth Circuit has held a party is not prohibited from introducing evidence in direct examination when the trial court has already ruled the evidence may be introduced on cross examination. Reyes v. Missouri Pac. R.R. Co., 589 F.2d 791 (5th Cir. 1979). . . .
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> Following our Reyes holding, we decline to agree that when opposing counsel obtains a ruling allowing it to introduce damaging evidence on cross, the affected party who attempts to anticipate that negative evidence waives his right to object to the introduction of that testimony by himself raising it. Clearly, no defendant would introduce damaging testimony unless he feared he would be more injured by the jury first hearing of that evidence from the prosecution. When the Government obtains a ruling in advance allowing it to introduce prior conviction evidence, the defendant is faced with a difficult dilemma: to refrain from testifying in his own defense, or risk impeachment by the opposite side. A holding that, under these facts, a defendant who testifies in anticipation automatically waives his right to object to a trial court's ruling admitting the damaging

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unconditional, adverse ruling and that, in this case, the district court only made a conditional ruling because it determined that the prior conviction was admissible if petitioner testified. The government fails to understand what the Seventh Circuit means by a conditional ruling in this context. In the Rule 609 context, the ruling only remains conditional, and thus unappealable, if the defendant does not testify. See Wilson, 182 F.3d at 565 (citing Luce, 469 U.S. 38). In this instance, however, the conditional ruling became unconditional the moment petitioner took the stand. In other words, at the time petitioner attempted to remove the sting, the district court's ruling was no longer conditional because the only condition precedent to the admission of the prior conviction had been satisfied.

> evidence goes against basic notions of fairness. Therefore, when the prosecution obtains, over objection, a ruling in limine that it may use evidence of an earlier conviction if the defendant testifies, the defendant who introduces evidence of the conviction, later found to be constitutionally infirm, in direct examination in an effort to ameliorate the highly prejudicial effect of that evidence, should not be deemed to have waived objection to the erroneous introduction of such evidence.

Fisher, 106 F.3d at 629 (parallel citations omitted). Despite this rather clear indication of a "square" conflict, the government contends that Fisher is limited to unusual facts, in that the prior conviction that was ruled admissible was later overturned as unconstitutional. While the Fifth Circuit did mention that the prior conviction had been overturned at the very end of its detailed explanation as to why it was rejecting the Ninth Circuit's appellate waiver rule, the above, lengthy quotation demonstrates that the government improperly contends that the Fifth Circuit "explicitly limited" its holding to those circumstances.

Perhaps recognizing that the holding in Fisher was not "explicitly limited," the government contends that the Fifth Circuit has simply adhered to its pre-Luce precedent, as established in Reyes, and has not considered the ramifications of Luce.[7] As previously argued, however, the primary reasoning in Luce, the inability to conduct appropriate appellate review on a blank factual record, is not applicable to the instant situation, and therefore the failure to mention

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[7] The government raises a similar, unpersuasive complaint about the Second Circuit's decision in United States v. Puco, 453 F.2d 539, 541 (2d Cir. 1971), which is in accord with the Fifth and Seventh Circuits. The government also argues that the Second Circuit has implied that Luce altered its previous holding in Puco but selectively parses language from two opinions that have nothing to do with the issue before the Court and do not even mention Puco. See OB at 8 (citing Palmieri v. Defaria, 88 F.3d 136, 139 (2d Cir. 1996) and Rosenfeld v. Basquiat, 78 F.3d 84, 90 (2d Cir. 1996)).

Luce in Fisher is inconsequential.[8]

In sum, the Ninth Circuit's decision below creates a "square" conflict with the Second, Fifth, and Seventh Circuits. In addition, as the government points out, the decision also may create a conflict with the Eleventh Circuit, which appears to be aligned with its predecessor circuit, the Fifth. See Judd v. Rodman, 105 F.3d 1339, 1342 (11th Cir. 1997); cf. United States v. Pritchard, 973 F.2d 905, 908 (11th Cir. 1992). Despite the government's contentions, there is not a mere "disagreement" (if there is such a thing) among the circuits; rather, there is a "square" conflict between the First, Sixth, Eighth, and Ninth Circuits on one side, and the Second, Fifth, Seventh, and perhaps Eleventh Circuits on the other. This conflict requires clarification by the Court.

III.

The government's final reason for denying the petition is that petitioner's convictions would not have been reversed even if the merits of the Rule 609 issue had been addressed, as the Ninth Circuit would not have found that the district court abused its discretion in reaching its decision. This argument is flawed for several reasons.

First, whether petitioner's convictions will ultimately be reversed is not a significant

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[8] The government also contends that the Fifth Circuit's law is unclear because one post-Luce Fifth Circuit decision conflicts with Fisher. See OB at 9 (citing United States v. Galvan-Garcia, 872 F.2d 638, 640 (5th Cir. 1989)). First, the government's description of Galvan-Garcia as a post-Luce decision is inconsequential, as the Fifth Circuit did not even cite Luce in the opinion. More importantly, Fisher actually addresses the government's claim regarding Galvan-Garcia: "Insofar as Galvan-Garcia suggests that a defendant waives any objection to the introduction of impeachment evidence when he offers evidence of prior convictions on direct examination, following an adverse ruling on a motion in limine concerning the admissibility of such prior convictions, we decline to follow that suggestion. As we have already explained, our decision in Reyes holds that a motion in limine is sufficient to preserve for appeal under such circumstances, and we reaffirm that holding today." Fisher, 106 F.3d at 630 n.7 (citations omitted). This footnote in Fisher further refutes the government's contention that the decision is specifically limited to its facts.

factor in determining whether the instant petition should be granted. "As the Court has observed in the past, 'it is very important that [it] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" Powell v. Nevada, 511 U.S. 79, 86-87 (1994) (Thomas, J., dissenting) (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). In other words, in determining whether to grant the instant petition for a writ of certiorari, the Court should be mainly concerned with settling the conflict among the lower courts regarding the issue presented, not in the actual outcome of the dispute between the litigating parties.

Even if the ultimate outcome of the merits of the Rule 609 determination were a significant concern in determining whether to grant the instant petition, the Court should not be persuaded by the government's contention that the Ninth Circuit would have affirmed because the district court's decision to admit the prior conviction was correct.[9] As an initial matter, despite the fact that courts of appeal often express a viewpoint on the merits of an issue even though they find that the issue has been waived, the Ninth Circuit in no way indicated that the district court's decision was correct in this particular instance. See Ohler, 169 F.3d at 1204 ("Because Ohler waived her right to appeal the district court's in limine ruling, we need not decide whether the district court erred

[9] Interestingly, before the Ninth Circuit, the government did not argue for affirmance of petitioner's convictions because any error in admitting her prior conviction was harmless; instead, the government simply contended that the Rule 609 issue had been waived and that the district court nevertheless correctly admitted the prior conviction. Likewise, in its response to the instant petition, the government does not make a harmless error argument. By not making such an argument, the government apparently concedes that any error in admitting the prior conviction was harmful. Ironically, the main reason underlying the Court's adoption of the appellate waiver rule in Luce, the inability to conduct harmless error review, is not implicated whatsoever in the instant case.

when it determined that Ohler's prior conviction for possession of methamphetamine was admissible for impeachment purposes under Rule 609(a)(1) of the Federal Rules of Evidence."). By failing to even comment on the merits of the issue, one could infer that the Ninth Circuit was at least troubled by the district court's ruling. Moreover, as set forth in the background section of this brief, the district court was troubled by the issue, thought that it was a very close call, and sought guidance from the Ninth Circuit.

Despite the Ninth Circuit's unwillingness to entertain the merits of the Rule 609 issue and the district court's statement that it was presented with a difficult, close call, the government apparently believes that an affirmance on the merits is inevitable in this instance, as it would be in most cases, because the standard of appellate review is abuse of discretion.[10] The Court, however, has recently emphasized that "an abuse of discretion standard does not mean a mistake of law is beyond appellate control. A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100 (1996) (citations omitted). In this instance, the district court erroneously applied the relevant legal standard governing the admissibility of a criminal defendant's prior conviction under Rule 609 and therefore abused its discretion. Although, given the nature of the issue presented to the Court, petitioner does not believe that it is necessary to recreate in full the arguments that she articulated to the Ninth Circuit as to why the district court erred in making its Rule 609 ruling, she will briefly explore the merits of the issue.

As an initial matter, although the district court properly cited the five-part test set forth in United States v. Browne, 829 F.2d 760, 762-63 (9th Cir. 1987) for determining the

[10] If the government is correct that district courts will rarely be reversed on Rule 609 issues because of the abuse-of-discretion standard, one is left to wonder whether there is even a need for an appellate waiver rule. In other words, if district courts will routinely be affirmed, why be so squeamish about reviewing the merits of the issue?

admissibility of a prior conviction under Rule 609,[11] it failed to recognize that, when considering these factors, the Ninth Circuit requires that the probative value of the prior conviction substantially outweigh its prejudicial effect. Id. In this case, when considering the five factors, the probative value of petitioner's prior conviction does not even outweigh, let alone substantially outweigh, its prejudicial effect.

The first, second, third, and fifth factors are, even when viewed in a light favoring admissibility, neutral. As to the first factor, while it is true that the Ninth Circuit has stated that prior convictions for drug distribution are probative of veracity, see United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997); United States v. Alexander, 48 F.3d 1477, 1488 (9th Cir. 1995), it has never held that simple drug possession, the prior conviction at issue here, is probative of veracity. Indeed, the district court struggled with this factor, and other circuits have suggested that such prior convictions are not probative of veracity.[12] As to the second factor, petitioner's prior conviction occurred more than four years prior to the instant offense, and she successfully completed the three-year probationary sentence imposed. The third factor is again, in a light favoring admissibility,

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[11] Courts are to consider: (1) the impeachment value of the prior crime; (2) the point in time of conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility. Browne, 829 F.2d at 763.

[12] Cf. Wilson v. Union Pacific Ry. Co., 56 F.3d 1226 (10th Cir. 1995) (conviction for drug possession alone is not highly relevant to the issue of veracity); United States v. McDonald, 905 F.2d 871, 875 (5th Cir. 1990) (drug use is not probative of truthfulness); United States v. Bentley, 706 F.2d 1498, 1509-10 (8th Cir. 1983) (involvement in a drug operation is not necessarily indicative of a lack of truthfulness under the standard imposed by Rule 608); United States v. Reed, 700 F.2d 638 (11th Cir. 1983)(Possession of a small amount of marijuana does not shed any light on character for truthfulness); United States v. Johnson, 495 F.2d 242 (10th Cir. 1974) (defendant's possible involvement with heroin clearly lacked enough substantial relevance to outweigh its prejudicial effect and its admission was an abuse of discretion); Puco, 453 F.2d at 543 (narcotics possession convictions have little bearing on the veracity of the accused as a witness).

neutral, as both the prior conviction and the instant offense involved the same subject matter -- drugs. Finally, with respect to the fifth factor, petitioner's credibility was certainly at issue, for whenever a defendant testifies, her credibility is at issue. The fifth factor, however, is mainly concerned with those cases where "there is a clear cut conflict between the testimony of prosecution and defense witnesses so that someone has to be lying." 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 609[03], at 609-40 (1996). In other words, the fifth factor is concerned with those cases where the issue will be "narrowed to the credibility of two persons -- the accused and his accuser," Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967) (Berger, J.), and this was not one of those cases.

Given that the first, second, third, and fifth factors are, giving the government the benefit of the doubt, neutral, the fourth factor must strongly weigh in favor of admissibility. The fourth factor, however, clearly weighs against admissibility. The government, through its silence, concedes that the fourth factor, the importance of petitioner's testimony, weighs strongly against admission of the prior conviction. Indeed, "[t]he need for defendant's version of the events, 'unembarrassed by mention of his previous difficulties with the law,' is particularly great 'where inferences founded upon unexplained acts are likely to be heavily operative.'" 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 609[03], at 609-40 (1996). In this case, petitioner needed to explain why she was driving a vehicle in which a large quantity of marijuana was hidden, as the jury would likely infer that she knew about the marijuana hidden in the vehicle if she did not provide an explanation. In sum, the overwhelming force of the fourth factor, when considering the weight of the other factors, dictates that the district court made an error of law, and thereby abused its discretion, when it determined that petitioner's prior conviction was admissible.

IV.

Finally, while the above analysis demonstrates that the instant petition should be granted because this case provides an excellent vehicle for resolving a "square" circuit-split, there is an additional, compelling reason for granting the petition: the Ninth Circuit's rule is wrong from both a statutory and policy perspective.

From a statutory perspective, Rule 103 of the Federal Rule of Evidence sets forth the requirements for claiming, on appeal, that an evidentiary ruling was in error. To challenge a decision to admit evidence, such as a prior conviction, a party merely needs to make "a timely objection or motion to strike . . . ." Fed. R. Evid. 103(a)(1). Rule 103 does not mention the appellate waiver rule created by the Ninth Circuit. Moreover, in 1990, Rule 609 was specifically amended to clarify that a party can introduce a prior conviction on direct examination in order to remove the sting of the forthcoming cross-examination. See Ohler, 169 F.3d at 1202. Rule 103, however, was not amended so as to require a party to forego this statutorily-sanctioned strategy in order to preserve a Rule 609 objection for appeal. In other words, the Ninth Circuit's rule is pure judicial invention.

From a policy perspective, several courts and commentators have discussed the unfairness of the Ninth Circuit's approach. See, e.g., Fisher, 106 F.3d at 629; Saltzburg, supra, at 37. Perhaps most notably, the approach requires the defendant not to mention his prior conviction during his testimony, and such silence "may be viewed by the jury as concealment of relevant facts." Id. Indeed, if a defendant chooses not to introduce evidence of the prior conviction during his direct examination, such a perceived "hide the ball" strategy will serve to undermine the integrity of both the defendant and his counsel before the jury. Id. Requiring a defendant and his counsel to look as if they are hiding facts from the jury in order to preserve a potentially meritorious issue on appeal offends traditional notions of fairness and improperly impinges on a defendant's Fifth and Sixth

Amendment rights to testify, to counsel, and to receive a fair trial.

In addition, the admission of a defendant's prior conviction is one of the most deadly weapons in a prosecutor's arsenal. Accordingly, a firm body of appellate case law should guide lower courts in determining when that deadly weapon may be used. Indeed, the district court in this instance was looking for guidance on the application of Rule 609. The Ninth Circuit's approach, however, practically halts the development of an appellate body of Rule 609 case law to guide lower courts in criminal cases.[13] There are already numerous hurdles that must be overcome in order to obtain a definitive appellate ruling on a Rule 609 issue. First, only defendants, not the government, can appeal a Rule 609 ruling. Second, defendants must properly object under Rule 103 or be subject to a plain error standard of review. Third, under Luce, defendants must testify. Fourth, appellate courts often avoid reaching the merits of a Rule 609 issue by directly proceeding to a harmless error analysis. Fifth, even if a case somehow manages to overcome all of these hurdles, definitive rulings are often clouded by an amorphous abuse-of-discretion standard of review. Thus, adding the Ninth Circuit's additional hurdle, which is a major one, practically ensures no further development in Rule 609 case law in the criminal context. Ironically, although the district court in this instance struggled with a "close call" and even sought appellate guidance, it was ultimately offered none by the Ninth Circuit.

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[13] The standard for the admissibility of a criminal defendant's prior conviction is different than the standard for other witnesses' prior convictions. See Fed. R. Evid. 609(a)(1).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant the instant petition for a writ of certiorari as this case provides an excellent vehicle for resolving a "square" conflict among the circuits.

Respectfully submitted,

Dated: September 17, 1999

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Granted

95-9828

Supreme Court, U.S.
FILED
AUG 26 1999
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August 20, 1999

Supreme Court of the United States
Office of the Clerk
Washington D.C. 20543

Re: Maria Suzuki Ohler v. United States
No. 98-9828

Pursuant to Rule 15.8 of the Rules of the United States Supreme Court, Ms. Ohler notes for the Court a relevant opinion from the Seventh Circuit that was issued following the filing of Ms. Ohler's petition for a writ of certiorari.

In Wilson v. Williams, __ F.3d __, No. 97-2637, 1999 WL 432591 at *4 (7th Cir.)(June 29, 1999)(en banc), an en banc Seventh Circuit held that a litigant does not waive his right to appeal an adverse pre-trial Rule 609 ruling if that litigant attempts to "remove the sting" of that ruling at trial. In so holding, the Seventh Circuit expressly rejected the Ninth Circuit's contrary position and has aligned itself with the Fifth and Second Circuits. Because this decision has further divided the Circuits as to the issue before the Court, it provides additional support for Ms. Ohler's petition for a writ of certiorari.

As it stands today, three Circuits, the Second, Fifth, and Seventh have definitively held that there is no appellate waiver of a district court's adverse Rule 609 in limine ruling if a litigant "removes the sting" of a prior conviction by himself introducing evidence of the conviction at trial. Two Circuits, the Tenth and Eleventh, implicitly have ruled similarly, as they have entertained such appeals on their merits despite the fact that the appealing parties themselves introduced evidence of the prior convictions. One Circuit, the Third, explicitly passed on deciding this issue. Finally, four Circuits, the First, Sixth, Eighth and Ninth, have held that appeal of an adverse in limine ruling is waived if the appealing party first introduced evidence of the conviction.

Sincerely,

Gary P. Burcham

cc: Seth P. Waxman

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Jackie WILSON, Plaintiff-Appellant,
v.
James K. WILLIAMS, Defendant-Appellee.

No. 97-2637.

United States Court of Appeals,
Seventh Circuit.

Argued April 22, 1999.

Decided June 29, 1999.

Pretrial detainee brought § 1983 alleging that guard at county jail used excessive force against him. The United States District Court for the Northern District of Illinois, Bernard A. Friedman, J., granted summary judgment for guard, and detainee appealed. The Court of Appeals, 997 F.2d 348, reversed. After trial ended in verdict for guard, the Court of Appeals again reversed, 83 F.3d 870. On appeal of verdict for guard, the Court of Appeals, 161 F.3d 1078, affirmed, and rehearing en banc was granted. Overruling York, 933 F.2d 1343, the Court of Appeals, Easterbrook, Circuit Judge, held that: (1) if pretrial ruling is definitive, objection at trial is not necessary to preserve issue for appellate review; (2) objection to guard's counsel's references to detainee as "cop killer" was forfeited; (3) such references did not result in plain error; (4) trial judge should not have denied detainee's pretrial motion outright; but (5) judge's error was harmless.

Affirmed.

Coffey, Circuit Judge, concurred in part and dissented in part, and filed opinion.

Manion, Circuit Judge, concurred in part and dissented in part, and filed opinion.

Diane P. Wood, Circuit Judge, dissented in part, and filed opinion in which Ripple, Circuit Judge, joined.

[1] FEDERAL COURTS ⇐625
170Bk625
If pretrial ruling is definitive, objection at trial is not necessary to preserve issue for appellate review; overruling, United States v. York, 933 F.2d 1343.

[2] FEDERAL COURTS ⇐625
170Bk625
When judge has made conditional, contingent, or tentative ruling, party must preserve his position at trial once ruling is made definitive.

[3] FEDERAL CIVIL PROCEDURE ⇐2019
170Ak2019
After district court's pretrial ruling, in detainee's § 1983 suit, that jail guard would be allowed to inform jury that detainee had been convicted of killing police officers, detainee did not surrender his objection by introducing that evidence himself, to draw its sting. 42 U.S.C.A. § 1983.

[4] FEDERAL CIVIL PROCEDURE ⇐2019
170Ak2019
Litigant who loses evidentiary ruling and then offers evidence himself does not thereby waive established objection.

[5] FEDERAL COURTS ⇐627.1
170Bk627.1
Pretrial objection to and ruling on particular use of evidence does not preserve objection to different and inappropriate use. Fed.Rules Evid.Rule 103(a)(1), 28 U.S.C.A.

[6] FEDERAL COURTS ⇐626
170Bk626
District court's pretrial ruling, in detainee's § 1983 suit alleging he was beaten by jail guard, denying detainee's request to exclude evidence that victims of murders for which he was detained were police officers, but not sanctioning any particular use of the evidence, was not definitive, and therefore, detainee was required to object at trial to preserve any error when guard's counsel repeatedly described detainee as "cop killer." 42 U.S.C.A. § 1983.

[7] FEDERAL COURTS ⇐611
170Bk611
"Plain error" means error that not only is clear in retrospect but also causes miscarriage of justice. Fed.Rules Evid.Rule 103(d), 28 U.S.C.A.
See publication Words and Phrases for other judicial constructions and definitions.

[7] FEDERAL COURTS ⇐891
170Bk891
"Plain error" means error that not only is clear in retrospect but also causes miscarriage of justice. Fed.Rules Evid.Rule 103(d), 28 U.S.C.A.
See publication Words and Phrases for other judicial constructions and definitions.

[8] FEDERAL COURTS ⇐626
170Bk626
In detainee's § 1983 suit alleging he was beaten by jail guard, plain error did not occur when guard's counsel repeatedly described detainee as "cop killer"; detainee may have withheld objection in hope that jurors would deem that guard had overplayed his hand or may have thought that guard's efforts to hammer away on cop-killer theme showed animus, and thus made detainee's accusations more credible. 42 U.S.C.A. § 1983; Fed.Rules Evid.Rule 103(d), 28 U.S.C.A.

[9] FEDERAL CIVIL PROCEDURE ⇐2011
170Ak2011
In detainee's § 1983 suit alleging he was beaten by jail guard, any legitimate use, by defense, of detainee's conviction of killing two police officers would have been served by informing jury that detainee had been convicted of murder and sentenced to life imprisonment, and therefore, trial judge should not have denied outright detainee's pretrial motion to prevent references to conviction. 42 U.S.C.A. § 1983.

[10] FEDERAL COURTS ⇐898
170Bk898
In detainee's § 1983 suit alleging he was beaten by jail guard, trial court's erroneous pretrial ruling, allowing evidence that victims of murders for which plaintiff was detained were police officers, was harmless, where evidence of detainee's statement that "I already killed two Chicago police officers" had been admitted without objection. 42 U.S.C.A. § 1983.

Steven H. Hoeft, Craig H. Zimmerman (argued), McDermott, Will & Emery, Chicago, IL, for Plaintiff-Appellant.

Richard A. Devine, Michael D. Jacobs, David S. Meyerson, Paul A. Castiglione (argued), Office of the State's Attorney of Cook County, Chicago, IL, for Defendant-Appellee.

Before POSNER, Chief Judge, and WOOD, JR., COFFEY, EASTERBROOK, RIPPLE, MANION, KANNE, DIANE P. WOOD, and EVANS, Circuit Judges. [FN*]

EASTERBROOK, Circuit Judge.

*1 We heard this case en banc to decide whether an objection at trial always is necessary after a pretrial ruling that evidence will be admitted. We conclude that a definitive ruling in limine preserves an issue for appellate review, without the need for later objection--but this is just a presumption, subject to variation by the trial judge, who may indicate that further consideration is in order. Moreover, issues about how the evidence is used, as opposed to yes-or-no questions about admissibility, frequently require attention at trial, so that failure to object means forfeiture. This latter principle determines the outcome of today's case.

Jackie Wilson alleges in this suit under 42 U.S.C. § 1983 that James Williams, a guard at the Cook County Jail, attacked him without provocation and inflicted serious injuries. Williams contends that Wilson was the aggressor and that the force used in defense was reasonable under the circumstances. The district court granted summary judgment to Williams, but we reversed and held that the conflicting stories must be presented to a jury. 997 F.2d 348 (1993). After a trial ended in a verdict for Williams, we reversed because of errors in the jury instructions. 83 F.3d 870 (1996). The second jury likewise sided with Williams, and this time the panel affirmed. 161 F.3d 1078 (1998).

Two police officers stopped the car in which Jackie and his brother Andrew were riding. Andrew grabbed one officer's service revolver and shot both with it, killing them; Jackie, who stole the second officer's gun, is culpable as an accomplice under the felony-murder doctrine because the deaths occurred during the commission of another felony (not only the thefts of the guns but also a plan to use the guns in helping a friend break out of prison). Andrew was convicted of both murders, People v. Wilson, 254 Ill.App.3d 1020, 193 Ill.Dec. 731, 626 N.E.2d 1282 (1st Dist.1993), and Jackie of one, People v. Wilson, 257 Ill.App.3d 670, 195 Ill.Dec. 8, 628 N.E.2d 472 (1st Dist.1993). Both Wilsons are serving terms of life imprisonment without possibility of parole, and both filed § 1983 suits contending that they were beaten (in separate incidents) while in custody before their convictions. Andrew recovered a substantial judgment, Wilson v. Chicago, 120 F.3d 681 (7th Cir.1997), though he had trouble receiving a fair trial because the defendants harped on the nature of the crime he had committed. See Wilson v. Chicago, 6 F.3d 1233 (7th Cir.1993) (reversing an initial jury verdict in defendants' favor because the district judge failed to control inappropriate use of Andrew's criminal history).

Before the second trial of his civil suit began, Jackie Wilson asked the district judge to prevent Williams from informing the jury that he had been convicted of killing a police officer. Wilson recognized that his criminal history could be used to impeach him. Although the convictions could not be used automatically under Fed.R.Evid. 609(a)(1), be

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remained subject to impeachment if application of Fed.R.Evid. 403 made it appropriate. Cf. Fed.R.Evid. 609(a)(2); Green v. Bock Laundry Machine Co., 490 U.S. 504, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989). Wilson's crimes called into question his willingness to be an honest witness. His life sentence meant that the threat of a perjury prosecution could not deter him from lying, and his lack of assets meant that malicious-prosecution or abuse-of-process litigation likewise held no terror for him. But Wilson sought to keep the identity of his crime from the jury's knowledge, lest the "cop killer" label inflame the jury against him. Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), shows that Wilson's was a reasonable request. Nonetheless, the judge denied the motion in limine, and when the trial began Wilson tried to make the best of his situation. His lawyer told the jury during his opening statement why Wilson was in custody and tried to use this to Wilson's advantage by arguing that Williams attacked Wilson because of the nature of Wilson's crime. Although Wilson's lawyer used the nature of the crime circumspectly, Williams's counsel had no reservations about the subject and invited the jury to rule against Wilson on emotional grounds. Practically the first words of counsel's opening statement were:

> *2 I'd like to reintroduce the litigant, Jackie Wilson, cop killer, murdered a Chicago police officer who was on duty, Officer O'Brien. He also robbed Officer O'Brien. He was convicted of that. He also robbed Officer O'Brien's partner, Officer Fahey. He was also convicted of that. And, yes, that is the crime he was waiting trial on back in 1988 in the Cook County Jail.

Throughout the trial, Williams's lawyer did not miss an opportunity to remind the jury that Wilson had committed a despicable offense, and therefore must be a despicable person who should not collect a dime. Defense counsel was not satisfied with a suggestion that the jury should consider the conviction in connection with Wilson's credibility as a witness. The nature of the crime colored the trial. "Cop killer" was the refrain; defense counsel was inflammatory throughout; neutral language such as "criminally accountable because he participated in a robbery during which his brother Andrew shot two men" did not pass counsel's lips.

Wilson did not object to defendant's telling the jury that he had been convicted of killing a police officer; by the time defense counsel stood up Wilson was hardly in a position to object, having provided that information himself. But he did argue on appeal that the judge should have granted the motion in limine and put the subject off limits to both sides. The majority of the panel concluded that failure to object at trial forfeited any opportunity to raise the issue on appeal; that the anticipatory use of the information affirmatively waived any entitlement to its exclusion; and that any error was harmless. The dissenting judge concluded that objection at trial was unnecessary, given the ruling in limine, and that the error was prejudicial. Although this may seem impossible, the court en banc concludes that both the majority and the dissent were fundamentally correct, and we affirm for a combination of the reasons given by both the majority and the dissent.

[1] First in sequence is the question whether an objection at trial was necessary, given the district court's pretrial ruling that Williams would be allowed to inform the jury that Wilson had been convicted, not simply of murder, but of killing a police officer. As the panel recognized, this court's precedents are in conflict. On the one hand, United States v. York, 933 F.2d 1343, 1360 (7th Cir.1991), holds that an objection at trial is necessary no matter how definitive the pretrial ruling may be. On the other hand, United States v. Madoch, 149 F.3d 596, 600 (7th Cir.1998), holds that although conditional rulings require further action at trial, definitive ones do not. Most cases in this circuit reach a conclusion similar to that of Madoch. E.g., Favala v. Cumberland Engineering Co., 17 F.3d 987, 991 (7th Cir.1994); Stutzman v. CRST, Inc., 997 F.2d 291, 298 (7th Cir.1993); Allison v. Ticor Title Insurance Co., 979 F.2d 1187, 1200 (7th Cir.1992); Cook v. Hoppin, 783 F.2d 684, 691 n. 2 (7th Cir.1986). An amendment to Fed.R.Evid. 103 that would resolve this disagreement, and provide that objection at trial is not necessary if the pretrial ruling is definitive, is wending its way through the long process under the Rules Enabling Act. See 181 F.R.D. 133 (1998). As it stands, however, Rule 103 is silent on the subject; we must formulate our own approach rather than appeal to authority or decide whether the pending amendment is the best solution.

*3 [2] One good example of a conditional ruling is a judge's statement that, if a litigant testifies, then the adverse party will be entitled to cross-examine in such-and-such a way. Until the condition has been satisfied by the testimony, the ruling has no effect. It is impossible to determine on appeal whether the ruling made a difference unless the witness does testify and the unfavorable evidence is admitted; what is more, there is a risk that the witness did not plan to

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testify even if the ruling had been favorable, but sought only to create an issue for appeal. In circumstances like this, the litigant must satisfy the condition in order to present the claim on appeal. Luce v. United States, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). Similarly, if the judge's pretrial ruling is tentative—if, for example, the judge says that certain evidence will be admitted unless it would be unduly prejudicial given the way the trial develops—then later events may lead to reconsideration, and the litigant adversely affected by the ruling must raise the subject later so that the judge may decide whether intervening events affect the ruling. An appeal in such a case without an objection at trial would bushwhack both the judge and the opponent. Objections alert the judge at critical junctures so that errors may be averted. When a judge has made a conditional, contingent, or tentative ruling, it remains possible to avert error by revisiting the subject.

Definitive rulings, however, do not invite reconsideration. When the judge makes a decision that does not depend on how the trial proceeds, then an objection will not serve the function of ensuring focused consideration at the time when decision is best made. A judge who rules definitively before trial sends the message that the right time has come and gone. An objection is unnecessary to prevent error, and it may do little other than slow down the trial. Sometimes an objection or offer of proof will alert the jury to the very thing that should be concealed. Suppose the judge had ruled that the identity of Wilson's victim was not to be brought out at trial. Would Williams have been required to do so anyway, letting the cat out of the bag, in order to preserve the claim of error for appeal? Motions in limine are designed to avoid the delay and occasional prejudice caused by objections and offers of proof at trial; they are more useful if they can serve these purposes, which they do only if objections (and offers of proof) can be foregone safely.

Treating a definitive ruling as sufficient to preserve the litigant's position for appeal also avoids laying a trap for unwary counselors. Many lawyers suppose that it is enough to raise an issue once and receive a definitive ruling. They may believe that raising the question again may annoy the judge. Rules of procedure should be as tolerant as is practical of lawyers' suppositions and omissions. When the function of an objection has been served via a motion and ruling before trial, requiring repetition at trial does little to advance the goals of vindicating rights and avoiding errors, but may create an opportunity for rights to be lost by inadvertence. Instead of laying snares, we adopt an approach that tolerates human failings. Lawyers can concentrate their mental energies on subjects that are more pressing or have yet to be dealt with, without the need to harp on issues that have been resolved.

*4 Conclusive pretrial rulings on evidence serve another useful end: they permit the parties to adjust their trial strategy in light of the court's decisions. Wilson wanted to keep the occupation of his victim out of the case, but if this could not be accomplished he wanted to introduce the evidence himself, if only to draw its sting. Sensible adaptations could not be accomplished if Wilson had to wait until Williams offered the evidence, and then raise an objection, acting in the jury's eyes as if he had something to hide. Waiting, objecting, and only then trying to make something of the subject not only would divest Wilson of the initiative but also would deprive him of an alternative theory of the case.

[3][4] Trial-time adaptations are benefits of pretrial rulings on evidence, so it follows that adaptations do not waive positions already staked out. Wilson did not surrender his objection by making the best he could of his situation after the judge's adverse ruling. See Judd v. Rodman, 105 F.3d 1339 (11th Cir.1997). Although some courts have held that a litigant who loses an evidentiary ruling and then offers the evidence himself has waived any opportunity to complain about the decision in limine, see United States v. Williams, 939 F.2d 721, 723 (9th Cir.1991); Gill v. Thomas, 83 F.3d 537, 540 (1st Cir.1996), this approach gives up one of the principal benefits of the pretrial-ruling procedure, and we therefore do not follow it. Our conclusion that preemptive use of evidence does not waive an established objection is compatible with United States v. DePriest, 6 F.3d 1201, 1209 (7th Cir.1993), which held that a defendant gives up his objection by making use of the evidence before the district judge renders a definitive ruling. Until a conditional or tentative decision has been made definitive, it is subject to reconsideration, and the party must preserve his position at trial. But once the ruling is definitive, the function of the objection requirement has been served, and both parties are entitled to formulate trial strategies that make the best use of the evidence that the judge has decided to admit or exclude. We overrule York to the extent it holds that an objection at trial is invariably required to preserve for appeal arguments that were fully presented to the district court before trial.

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A vital qualification is implicit in this way of putting the conclusion. Only arguments that were actually presented to the district court before trial are preserved for appeal--and then only if the district judge came to a definitive conclusion. A judge who expresses a tentative or conditional ruling can by that step require the parties to raise the issue again at trial. District judges thus are fully in charge of the process; they can require or excuse further exchanges on a subject by the way they express their rulings. A judge would do well to explain in the decision proper (or in the final pretrial conference) whether the conclusion is definitive, and whether consideration at trial is required, appropriate, or forbidden; the majority of the panel sensibly pointed out advantages to such a procedure; but if the judge does not elaborate, then we assume that an apparently unconditional ruling is conclusive.

*5 [5] Even if the ruling is unconditional, however, it resolves only the arguments actually presented. That much is clear from Fed.R.Evid. 103(a)(1), which requires a litigant to state a specific ground for an objection to evidence; grounds not presented cannot be raised later, else both judge and adversary are sandbagged (and preventable errors occur). There's a corollary to this point: a pretrial objection to and ruling on a particular use of evidence does not preserve an objection to a different and inappropriate use. Thus if the judge decides before trial that particular evidence can be used for impeachment, then there is no need to object at trial to this use; but a completely different use of the evidence is not covered by the ruling, and therefore fresh attention at trial (prompted by an objection) is essential if the error-prevention function of the contemporaneous-objection rule is to be achieved.

[6] This is where Wilson's appeal founders. The district judge, asked before trial to forbid all reference to the occupation of the murder victims, said no. This meant at a minimum that Wilson could be cross-examined about the conviction when he testified on his own behalf. It also implied that Williams could present the testimony of another guard, Officer Cavallone, that Wilson stated during a trip to the infirmary after the altercation: "[Y]ou should have killed me when you had the chance. I already killed two Chicago police officers. My attorney is going to have a field day with this. I have no respect for the law. And the next thing we are going to do is take care of the blue shirts [guards] inside the jail." Williams offered this statement to corroborate his view that Wilson had a hostile and aggressive attitude, and either initiated the altercation or planned to invent a story for his attorney to have a "field day" with. Wilson denies saying any such thing to Cavallone, and he wanted the line "I already killed two Chicago police officers" redacted. The judge did not require this step. But beyond permitting Cavallone to testify to the full version of the statement, and permitting the use of the conviction to call Wilson's credibility as a witness into question, the ruling in limine did not sanction any particular use of evidence. In particular, the judge did not give Williams's counsel permission to introduce Wilson as a "cop killer," to describe the details of the crime, to seek sympathy for Wilson's victims, or to imply that people who commit heinous offenses are fair game in prison--all of which Williams's lawyer did, and without objection. The pretrial ruling did not say or imply that such uses (or misuses) of the evidence would be allowed. We reversed the verdict for defendants in the first trial of Andrew Wilson's § 1983 action precisely because defense counsel harped on the details of the murders and sought an emotional rather than reasoned evaluation of the facts. The defense strategy in Jackie Wilson's second trial was similar to that in Andrew Wilson's first--but the big difference is that Andrew Wilson's lawyers objected, and Jackie Wilson's did not. Misuse of evidence that has a proper use cannot be argued on appeal without a specific objection. See Fed.R.Evid. 103(a)(1).

*6 A pretrial ruling is definitive only with respect to subjects it covers. Details of usage were not raised or resolved before trial. If the only problem were that Williams's counsel once said "cop killer" rather than a more neutral formulation, or repeated the statement when using the conviction for impeachment, we would be reluctant to say that objection has been forfeited. Misuse of evidence is a matter of degree, and litigants receive the benefit of the doubt in grey areas. But defense counsel strummed on "cop killer" as if it were a guitar rather than a bit of evidence; whatever line there was between proper and improper use was overstepped; objection never came, so forfeiture occurred and the plain-error standard governs. Fed.R.Evid. 103(d).

[7][8] Plain error means an error that not only is clear in retrospect but also causes a miscarriage of justice. United States v. Olano, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Wilson has not persuaded us that justice miscarried in his trial because of the way Williams used Wilson's crime. Blatant efforts to manipulate jurors' emotions and persuade them to ignore the facts and instructions

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often backfire. Wilson may have withheld objection in the hope that jurors would deem that Williams had overplayed his hand. Moreover, Wilson might have thought that Williams's efforts to hammer away on the cop-killer theme showed animus, and thus made Wilson's accusation against Williams more credible. Wilson had a weak case on damages, and success on liability depended on the resolution of a credibility contest. How the balance of advantage from the overuse of the cop-killer theme plays out in such a trial is difficult to say. The effects are not so inevitably baleful to the truth-finding function of trial that the problem must be deemed "plain error."

[9][10] At last, in what must appear to be an afterthought, we tackle the issue that has been preserved: whether the district judge should have ruled before trial that the nature of Wilson's crime is inadmissible. As the Supreme Court observed in Old Chief, the precise identity of a crime often creates a potential for prejudice that overwhelms its constructive value. Any legitimate use of the conviction by the defense would have been served by informing the jury that Wilson has been convicted of murder and sentenced to life imprisonment. The judge thus abused his discretion in denying the motion outright. But at oral argument before the court en banc, Wilson's lawyer disclaimed any contention that the district judge should have barred Cavallone from testifying that Wilson said "I already killed two Chicago police officers." With this statement in evidence, the district judge's error with respect to the Old Chief issue is harmless. Williams's harping on the subject, and his implication that "cop killers" are not entitled to damages when guards behave as vigilantes, could not be thought harmless, but the lack of objection means that the misuse of the evidence has not been preserved for appellate review. As a result, the judgment is

*7 AFFIRMED.

COFFEY, Circuit Judge, concurring in part and dissenting in part.

On May 3, 1989, the plaintiff-appellant Wilson was convicted of the armed robbery and murder of one Chicago police officer and of the armed robbery of a second Chicago police officer. More than one year later, on July 9, 1990, Wilson filed this § 1983 action, alleging that he was assaulted by the defendant-appellee Williams, a prison guard in the Cook County, Illinois, Jail, and furthermore that the assault constituted a violation of his due process rights under the Fourteenth Amendment. The district court granted Williams' motion for summary judgment and made note of the fact that the physician who examined Wilson had stated in his medical report that Wilson's injuries were only "superficial" in nature, that "being kicked ... would involve more extensive injuries than what [was] present," and that if Wilson "had received a significant blow or trauma ..., one would expect to see some evidence of traumatic degree." This Court reversed the granting of the summary judgment motion on the grounds that genuine issues of material fact existed as to whether Wilson had initiated the fight with Williams and remanded the case for trial. See Wilson v. Williams, 997 F.2d 348 (7th Cir.1993). At the new trial, the jury rendered a verdict for Williams, and Wilson appealed a second time, and this Court reversed a second time, holding that the trial judge had committed error in giving a confusing "good faith" defense instruction. See Wilson v. Williams, 83 F.3d 870 (7th Cir.1996). Once again, the case was remanded to the district court for a new trial, and approximately three months prior to trial, Wilson filed a motion in limine seeking to exclude any evidence of his prior criminal murder conviction. The trial judge ruled that the jury could hear evidence of the prior murder conviction for impeachment purposes only, including the date, time, conviction, and employment of the victim. Just prior to his opening statement, Wilson's counsel renewed his objection to the introduction of any evidence dealing with the fact that the murder victim was a Chicago police officer. The trial judge again denied Wilson's motion in limine to bar evidence of his prior murder conviction. Wilson's counsel proceeded with his opening statement and referred to the fact that his client Wilson was a "cop killer." Later, upon questioning by his counsel during direct testimony, Wilson testified that he had been convicted of murder and armed robbery. Then, on cross-examination, Williams' counsel asked Wilson whether he had been convicted of murdering a Chicago police officer. The plaintiff Wilson's counsel failed to object to this question, and Wilson responded in the affirmative. Just before the case went to the jury, Wilson's counsel again brought up his client's prior convictions for murder and armed robbery and specifically referred to him as a "cop killer" in so many words no less than seven times during closing argument. The jury returned a verdict for the defendant Williams, and Wilson once again appealed, taking his third bite from the apple. This Court affirmed the conviction in a two-to-one panel majority decision, concluding that: (1) Wilson waived his objection to the introduction of evidence regarding his murder victim's occupation by failing to renew his

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motion in limine during trial and by failing to timely object when the disputed evidence was introduced through the testimony of a prison guard who heard Wilson comment: "I already killed two Chicago police officers.... I have no respect for the law. And the next thing we are going to do is take care of the blue shirts [prison guards] inside the jail"; [FN1] (2) Wilson waived his objection by preemptively informing the jury on eight occasions at trial of the very evidence that he wanted to exclude, including using it for his own strategic purposes in his closing argument; and (3) the trial court did not commit error in admitting evidence regarding Wilson's prior victims. Wilson v. Williams, 161 F.3d 1078, 1080-81 (7th Cir.1998) (emphases added).

*8 Thereafter, the Court, upon petition, voted to hold an en banc hearing and the majority, in affirming the prior panel's holding, concluded that the trial court did not commit error in admitting evidence regarding Wilson's prior victims and that Wilson waived his objection by failing to timely object when the disputed evidence was introduced. In fact, the majority draws heavily from the panel decision and holds, as we pointed out, that

> [p]lain error means an error that not only is clear in retrospect but also causes a miscarriage of justice. United States v. Olano, 507 U.S. 725, 736 [, 113 S.Ct. 1770, 123 L.Ed.2d 508] (1993). Wilson has not persuaded us that justice miscarried in his trial because of the way Williams used Wilson's crime.... Wilson may have withheld objection in the hope that jurors would deem that Williams had overplayed his hand.

In commenting on Wilson's failure to object to the introduction of evidence that he was a "cop killer," the majority also notes, as made clear in the prior panel's opinion, that "the lack of objection [by Wilson's attorney] means that the misuse of the evidence has not been preserved for appellate review." I concur with the majority's holding on both grounds. However, after writing for the majority in the panel opinion, I am now forced to dissent only from that part of the en banc majority wherein it concludes "that a definitive ruling in limine preserves an issue for appellate review, without the need for later objection--but this is a presumption, subject to variation by the trial judge, who may indicate that further consideration is in order." In so holding, the majority rejects the panel's conclusion, and that of six of our sister circuits, holding that a party whose pre-trial in limine motion has been denied must renew his objection when the evidence the party sought to prevent is about to be introduced at trial, regardless of the judge's pretrial ruling.

The original panel's holding concerning in limine motions is based on this Circuit's decision in United States v. York, 933 F.2d 1343 (7th Cir.1991), as well as the majority of circuits referred to. In York, we held that an in limine motion must be renewed at trial or the objection is waived: " '[a] party whose motion in limine has been overruled must object when the error the party sought to prevent is about to occur at trial.' " Id. at 1360 (citation omitted) (emphasis added). The rule in York is preferable because, in the interest of justice and fair play, a court must have the flexibility to reconsider the denial of a prior in limine ruling, which is hopefully not cast in stone, if other material evidence is received later in the trial which gives the trier of fact cause to pause and reconsider his earlier ruling. The York and panel decisions comport with the Supreme Court's presently ruling case law analysis in Luce v. United States, 469 U.S. 38, 41, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984), which mandates that an in limine ruling is merely speculative in effect, completely dependent upon what happens at trial. As stated by the nine wise men and women now gracing our country's highest bench on the Potomac River, "[t]he ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling." Id. at 41-42, 105 S.Ct. 460.

*9 A motion in limine is a request for guidance by the court regarding an evidentiary question. The trial court may, within its discretion, provide such guidance by making a preliminary ruling with respect to admissibility. The parties may then consider the court's ruling when formulating their trial strategy. However, we see no reason why the trial court could not change its ruling, for whatever reason, when the evidence is actually offered and objected to at trial. A ruling on a motion in limine is therefore essentially an advisory opinion by the trial court.

United States v. Luce, 713 F.2d 1236, 1239 (6th Cir.1983), aff'd, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984) (citations omitted) (emphases added). Other courts have adopted the reasoning in Luce that in limine rulings are preliminary: "An in limine evidentiary ruling does not constitute a final ruling on admissibility.... Th[is] rule is a practical one. There is no reason to spend scarce judicial resources reviewing a decision that may be changed due to developments at trial." Palmieri v. Defaria, 88

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F.3d 136, 139 (2nd Cir.1996) (citation and internal quotations omitted). "[A]ny possible harm flowing from the in limine ruling is wholly speculative because a trial court, exercising sound judicial discretion, may always alter such rulings as the case unfolds." United States v. Nivica, 887 F.2d 1110, 1116 (1st Cir.1989) (citation and internal quotations omitted). Thus, regardless of what counsel might infer from the judge's wording when he makes an in limine ruling, that decision is only preliminary. See Coursen v. A.H. Robins Co., 764 F.2d 1329, 1342 (9th Cir.1985). Once again, I endorse York because I am convinced that a court may and should, either upon proper motion or even sua sponte, be allowed to reconsider and possibly reverse or affirm the denial of a prior in limine ruling if other material evidence is subsequently received in the trial that causes the trier of fact to pause and reflect, in the interest of justice and fair play, and reconsider the earlier ruling.

In rejecting this precedent, the majority proposes that certain in limine motions, those that are "qualified," be renewed prior to the introduction of the evidence in question, and other in limine motions, those that are "definitive," need not be renewed. Such a proposal would create an odd schism in the law. [FN2] I find it hard to understand, as the author of the majority opinion writes, how a trial judge should somehow be expected to look into his crystal ball and, by court rule, be bound to make a "definitive," all-encompassing ruling prior to the reception of any, much less all, of the evidence. Such a determination would clearly be based only on what was considered and referred to at preliminary pre-trial conferences. Based on my twenty-plus years of trial experience, I seriously question whether the rule proposed by the majority is entitled to life. [FN3] The term "definitive" is not well adapted to use in the rules of evidence. According to the American Heritage Dictionary, "definitive" is "precisely defining or outlining; explicit"--it is somewhat difficult to at best speculate on how such a term could be applied to a trial judge's ruling on an in limine motion. 375 (2d ed.1982). Furthermore, the distinction the majority advocates is not even addressed in the holding in Luce, 469 U.S. at 41-42, 105 S.Ct. 460, which reads:

> *10 Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling.

All that the United States Supreme Court requires in Luce is that in limine motions be repeated during trial. An experienced trial judge will allow and, more often than not, order that any repeated motion and/or argument be heard in the absence of the jury. The Luce Court went on to state that an in limine ruling, by its very nature, is always speculative in effect--"speculativeness" is the essence of any in limine ruling. See id. This reading of Luce is reinforced by the Supreme Court's use of the language "even if nothing unexpected happens at trial." Id. With the use of this language, the Supreme Court seems to be referring to those situations wherein the trial court, having ruled on an in limine motion, did not anticipate changing its mind as trial unfolded. In other words, this language seems to take into account all in limine rulings. Because Luce stands for the proposition that a trial judge's ruling on an in limine motion can and ofttimes does change from the time of the commencement of the trial to its end, as in York, I am convinced that the ends of justice would be best served by requiring attorneys to repeat their pretrial in limine objections at trial (prior to the introduction of the questionable evidence). Since, all too frequently, it is impossible to determine from the very language of the court's ruling whether the ruling is "qualified" or "definitive," it is unfair to place attorneys in situations where they must speculate, worry, and/or guess as to the nature of the judge's ruling. The term "definitive" could be more specific and detailed, and the majority's proposal places the onus on the attorney to question the judge (which may be considered by many attorneys to be a more onerous burden than the repeating of a prior motion) or speculate as to whether the ruling is a final ruling. Even if a judge somehow issues a "definitive" ruling, the evidence in question may be received during trial for a purpose different than that originally anticipated, thus altering the conditions upon which the earlier- granted "definitive" ruling was made. The majority's proposal thus has the effect of "boxing in" the trial judge to an earlier-stated "definitive" ruling. Furthermore, I am not convinced that the Supreme Court will accept the majority's new dichotomy which, in my view, may amount to nothing more than a response to the ever-growing lobbying influence of trial lawyers--a group whose goals do not always rise to the level of what is in the best interest of justice for the litigants in our overburdened legal system.

*11 This said, the in limine ruling in this case, as with all in limine rulings, was provisional and clearly within the ambit of Luce. Wilson's attorney obviously

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was under the impression that the judge's ruling was provisional, for he continued to repeat the evidence he previously sought to exclude and repeatedly referred to the hot-button phrase "cop killer" some eight different times during trial. Also, either he thought the ruling was provisional and was hoping the judge would change his mind concerning his prior ruling, or he was attempting to take the sting out of evidence he believed would ultimately be introduced at trial by Williams by raising the evidence himself.

The rule in York is the controlling case law in the majority of circuits (7) across the country. The First Circuit has held: "Merely making an unsuccessful motion in limine to exclude evidence is insufficient to preserve a claim of error; the protesting party ordinarily must revivify his opposition at the time the evidence is offered." United States v. Joost, 133 F.3d 125, 129 (1st Cir.1998) (citation omitted). The Second Circuit, writing on the in limine issue, has stated: "When the district court denied [the defendant's] in limine motion to exclude all evidence of [the death of an individual to whom he sold heroin], it did not thereby relieve ... counsel of the obligation to object whenever specific inflammatory statements were made at trial." United States v. Birbal, 62 F.3d 456, 465 (2nd Cir.1995). The Tenth Circuit has noted: "A party whose motion in limine has been overruled must nevertheless object when the error he sought to prevent by his motion occurs at trial." McEwen v. City of Norman, Okla., 926 F.2d 1539, 1544 (10th Cir.1991). A number of other circuits have reached similar conclusions: " '[A] party whose motion in limine has been overruled must object when the error he sought to prevent with his motion is about to occur at trial.' " Hendrix v. Raybestos- Manhattan, Inc., 776 F.2d 1492, 1504 (11th Cir.1985) (quoting Collins, infra). See also Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1333 (8th Cir.1985); Collins v. Wayne Corp., 621 F.2d 777, 785 (5th Cir.1980) ("[A]n objection is required to preserve error in the admission of testimony or the allowance of cross-examination even when a party has unsuccessfully moved in limine to suppress that testimony or cross- examination.").

[T]he confusion generally surrounding preservation of appeal rights with respect to motions in limine mandates that, absent clear authority in a given jurisdiction, counsel treat all rulings, no matter how couched, as preserved only through objection or offer of proof made at trial. Obviously, with respect to preliminary motions in limine, no other conclusion is possible.

*12 Michael H. Graham, Rulings on Admissibility of Evidence Outside the Hearing of the Jury--Motions in Limine, 17 Crim. L. Bull. 60, 68 (1981). See also Johnny K. Richardson, Comment, Use of Motions in Limine in Civil Proceedings, 45 Mo. L. Rev. 130, 138 (1980). The highly respected evidentiary commentator, Jack B. Weinstein, has stated: "If a party has raised an objection before trial by means of a motion in limine that the court has denied, most courts hold that the objection must be renewed at trial for the objection to be preserved for appeal." Weinstein's Federal Evidence § 103.11[2][b] at 103-16 (1997 ed.) (emphasis added). See also 1 Michael H. Graham, Handbook of Federal Evidence § 103.8 at 50 (4th ed. 1996) ("To preserve error for appeal, counsel most often will be required to and thus to be safe should either renew the objection or make an offer of proof at trial." (emphasis added)). Such actions on the part of trial counsel only serve to create a more complete and accurate record for the reviewing courts in our never-ending search for justice.

The author of the proposed majority en banc, without any reasoning, has cast aside York and refuses to recognize the extent of the broad-based support the circuit courts' majority view expressed in York has received throughout the country and, on the other hand, attempts to bolster his argument by bootstrapping and pointing out that the Advisory Committee on the Rules of Evidence is currently amending Fed.R.Evid. 103 to provide that the renewal of the objection at trial is not necessary. This type of bolstering is of little value, for it is impossible to predict when or whether the Advisory Committee's proposals, if ever, will be approved by the United States Supreme Court and/or the U.S. Congress. On the other hand, if the suggested rule does become law, then this Circuit, along with the other six circuits which have endorsed and continue to follow the view adopted in York and have obviously found it most helpful in conducting well-orchestrated trials, will be free to adjust their decisions in the future. The rule-making process can often be derailed when the well-educated, reasoned minds of the Supreme Court weigh in, and what are predicted to be quick changes can be short-circuited.

The new majority opinion goes on to argue that attorneys may be hesitant to continue raising objections at trial for fear that they will "annoy the judge." I query the majority whether an attorney would similarly be "annoying" the judge when asking him to explain his ruling and whether it is "qualified" or "definitive"? In deference to the drafters of the

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amended rules, including those who may not have had the benefit of trial experience, even if Wilson's counsel had believed that the judge had issued a "definitive" in limine ruling, any qualified trial counsel would be well advised to ask the presiding judge for a clarification concerning whether he should restate his in limine motion prior to the introduction of evidence at trial. Repeating the objection gives the trial judge an opportunity to review his earlier ruling based upon the totality of the evidence received up to that point and flags it for the attention of the appellate tribunal. Furthermore, "[c]ounsel has a duty to object, and even at the risk of incurring the displeasure of the trial court, to insist upon his objection." United States v. Warner, 855 F.2d 372, 374 (7th Cir.1988) (citation and internal quotations omitted). In fact, the same Committee that has recommended the change in the evidentiary rules even alludes to such a requirement in its commentary, in an attempt to protect itself: "the amendment imposes the obligation on counsel to clarify whether an in limine or other evidentiary ruling is definitive when there is doubt on that point." It is a shame that Wilson's counsel was not aware of his obligation to properly and timely object in this case--had he done so, a discussion of this issue would have been unnecessary.

*13 Finally, as we also made clear in the panel opinion, and contrary to the majority's contention, this Court has previously held that "[a] defendant waives his right to appeal a trial court's pretrial ruling that a prior conviction can be used by the prosecution for purposes of impeachment when the defendant himself brought out the fact of the prior conviction in his direct testimony." United States v. DePriest, 6 F.3d 1201, 1209 (7th Cir.1993) (citation omitted) (emphasis added). In this case, Wilson's counsel repeated and impressed upon the jury that Wilson was a "cop killer" no less than eight times during the course of the trial. Though the majority cleverly attempts to distinguish DePriest from the circumstances under consideration by stating that the in limine ruling in DePriest came after the defendant's testimony at issue, the DePriest court goes on to state: "[e]ven if the ruling had been made prior to the defendant's direct examination, we do not believe that reversible error would have been committed." Id. (emphasis added). Thus, the majority's attempt to distinguish DePriest by pointing out that the ruling came after the defendant's testimony is something less than a complete reading of the holding in DePriest. In fact, the DePriest court goes on to cite as precedent United States v. Williams, 939 F.2d 721 (9th Cir.1991), one of the very cases that the majority contends it is rejecting in reaching its conclusion. See also Gill v. Thomas, 83 F.3d 537 (1st Cir.1996) (After the trial judge denied the plaintiff's motion in limine to exclude evidence of several prior misdemeanors, the plaintiff introduced evidence of the misdemeanors in an attempt to "remove the sting" from the arresting officer's anticipated impeachment testimony; the court held that the attempt to remove the sting "opened the door" to the defendant's cross- examination).

In conclusion, I concur with the majority insofar as it draws from the original panel's decision holding that the trial court did not commit plain error in ruling that Williams' use of the "cop killer" term did not deny Wilson a fair trial and that "the lack of objection [by Wilson's attorney] means that the misuse of the evidence has not been preserved for appellate review." I dissent to the extent that the majority rejects our holding in York. According to the theory in York, which has been endorsed by the majority (7) of circuits across the country, had Wilson been desirous of preserving his objection to evidence that Wilson had murdered a police officer, he was required to renew his in limine motion and object contemporaneously with the reception of such evidence; it was not sufficient to merely rely upon his in limine motion. The majority instead proposes that we, following the lead of the Advisory Committee on the Federal Rules of Evidence, establish precedent providing that certain in limine motions, those that are "qualified," need be renewed prior to the introduction of the evidence in question, and other in limine motions, those that are "definitive," need not be renewed. I am not swayed that we must act now so that our jurisprudence coincides with an, at best, anticipatory rule of evidence that may, at some point in futurity, be adopted by the Supreme Court. In addition, I note that Wilson waived his right to appeal on this ground by introducing the jury during his opening statement to the fact that he had been convicted of murdering a police officer, even before Williams made mention of it, by failing to object at either of the two instances that the disputed evidence was elicited by witnesses at trial, and by referencing the disputed evidence seven times so as to make it the focus of his closing argument.

MANION, Circuit Judge, concurring in part, dissenting in part, and concurring in judgment.

*14 I agree with the court that the judgment be affirmed. But I am concerned with the court's attempt to construct a rule distinguishing a definitive and a conditional ruling on a motion in limine. At the outset,

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however, I should note the points of agreement I have with the court. Regarding the merits, I agree with the court that irrespective of the motion in limine, Wilson's counsel had the obligation to object to the use of the term "copkiller" by defense counsel, because the motion in limine did not address this issue. I further agree with the court that saying "cop-killer" is not plain error because of the possibility that this evidence would prejudice the jury against Wilson. Even without the "cop-killer" comments, the jury would know that Wilson was in jail, and the jurors would be entitled to know that Wilson had been convicted of murder. Fed.R.Evid. 609(a). This evidence would certainly impinge on Wilson's credibility. But Wilson being a copkiller, instead of just another convicted murderer, offers a unique motive for prison guards singling him out and beating him. Arguably, Wilson's case was stronger with this revenge-motive evidence than without it.

Beyond the facts of this case, however, the rule the court constructs to regulate motions in limine may create more problems than it solves. The court concludes a motion in limine is definitive when the judge's ruling is not tentative and does not depend on a condition being satisfied. Inevitably this invites satellite litigation over whether a ruling is definitive or conditional.

A pre-trial motion in limine serves two valuable purposes. The first is to allow the court and the parties to argue evidentiary issues in detail, avoiding significant delay after a jury has been impaneled. Thereby, when the issue presents itself during trial, counsel need do no more than renew the motion in limine (or the objection thereto). If, as the trial evidence develops, the district court is of the same opinion as before trial, the judge merely has to incorporate his reasoning in denying (or granting) the motion in limine. This is neither time-consuming nor difficult. The second benefit of the motion is to alert the district court to evidentiary issues which are potentially prejudicial in their nature. Rule 103(c) of the Federal Rules of Evidence already recognizes this concern, and directs district courts to conduct proceedings "so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof ... in the hearing of the jury." A motion in limine allows counsel to apprise the district court of these potential issues, so that when (and if) they arise during the proceedings, the district court will be positioned to excuse the jury or call a sidebar if necessary. And if the factual basis of the motion in limine was accurate, and the judge sees no need to revisit the issue, the attorneys and court may simply incorporate the motion in limine material by reference, without alerting the jury to their substance. Or, if necessary, opposing counsel can make an offer of proof when the jury isn't present. Neither of these purposes are substantially advanced by the court's definitive/conditional test.

*15 I also have concerns over how this court will be able to assess whether a definitive evidentiary ruling made in advance of trial would be sufficiently prejudicial to warrant reversal. When counsel on appeal argues that the case would have been tried in a completely different fashion but for an erroneous ruling on a motion in limine, will we have to envision an entirely different trial, and anticipate what the result would have been, in order to determine whether the error was harmless? One alternative, to grant an automatic reversal, would no doubt stop district courts from granting definitive motions in limine.

I echo the sentiments of Judge Diane P. Wood in concluding that even now, the prudent practice will be to renew all objections at trial, thus avoiding equivocation over whether the ruling in place will suffice. I also share the concerns of Judge Coffey regarding the practicality of this rule. Very little will change before the district courts, but I expect that this court will face appeals over whether a "definitive" ruling covered evidence entered without objection. I also question establishing a presumptive rule, that motions in limine are definitive, when most motions will fall under the conditional exception. In my view, the bright line rule always requiring an objection or offer of proof is the most efficient, most straightforward, and most fair rule that we can adopt.

DIANE P. WOOD, Circuit Judge, with whom RIPPLE, Circuit Judge, joins, dissenting in part.

While I agree with the en banc majority on the larger issues of law that this case presents, I am unable to concur with its finding that the errors that infected this trial do not require reversal. I therefore dissent from the disposition of Wilson's appeal.

At the outset, I wish to make clear the points on which I am entirely in agreement with the majority. First, I agree that in a case where the district judge has ruled on a motion in limine, further objection at trial is necessary if the ruling was in any sense conditional, but it is not necessary to the extent the ruling was definitive. Ante at ---- - ----. Second, I also

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agree that, in applying this rule to definitive rulings, it is important to respect the limits of the ruling. Ante at ---- - ----. If there is an expansion, modification, or other alteration in the predicate upon which the district court based its earlier definitive ruling, counsel must make a separate objection at trial to the altered use in order to preserve that new point on appeal. The boundary between what has been decided definitively and what is new will sometimes be difficult to discern, as Wilson's case illustrates. The court holds today that his lawyer's motion in limine preserved his right to appeal the district court's decision to allow into evidence the fact that his victim was a Chicago police officer, but it did not preserve his right to appeal defense counsel's incessant harping on that fact. In some cases, it may be difficult for counsel to know when permissible use is transformed into abusive misuse. Only case-by-case development will throw light on where that line lies, and prudent counsel should certainly err on the side of renewing objections at trial, lest the affected party forfeit valid arguments for appeal.

*16 I also agree with the majority that a party faced with a definitive ruling on a motion in limine does not forfeit the right to object to evidence when she tries to make the best of a bad situation. Ante at ---- - ----. Wilson's lawyer therefore had the right to introduce the fact that he was not only a convicted murderer, but a convicted murderer of a Chicago police officer. This also justified Wilson's effort to make strategic use of that damning information, by suggesting that the identity of his victim might have inspired Williams's allegedly unprovoked attack on him.

The place where I part company with the majority is in its application of these rules. To begin with, it is important to remember that there are two separate potential sources of reversible error in this case: the introduction of evidence concerning the victims of Wilson's crimes and the misuse of this evidence. With respect to the latter, because Wilson's failure to object to the improper use of the victim identity evidence led him to forfeit this point, ante at ----, the question is how his appeal fares under the plain error standard of review of Fed.R.Evid. 103(d). A review of this transcript leaves no doubt that the error is clear in retrospect, and I do not understand the majority to assert otherwise. That leaves the question whether this was an error that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," and thereby caused a miscarriage of justice. See United States v. Olano, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (internal quotations deleted). In a brisk paragraph, the majority concludes that it did not, based solely on the fact that Wilson succeeded in finding a strategic use for the offensive information. Ante at ----. But this conclusion loses sight of the very point that lies behind the finding of forfeiture: far more was going on here than the simple act of making sure the jury knew what Wilson had done. Instead, defense counsel openly, repeatedly, and blatantly urged the jury to find against Wilson because of what lay in his past. The misuse of the evidence was so extreme and so pervasive that, even though Wilson forfeited his objection, I would find plain error and reverse on this ground.

Even if the misuse of the victim identity evidence did not rise to the level of plain error, there would remain the question whether the district court committed reversible error in permitting defense counsel to use the evidence at all. Here too, I agree with the majority at the beginning of its analysis, but not at the end. The district court abused its discretion in denying the motion in limine outright, because as the majority points out, any legitimate use of the conviction would have been served by informing the jury that Wilson had been convicted of murder and sentenced to life imprisonment. Ante at ----. Nevertheless, according to the majority, the fact that Wilson's lawyer at oral argument was not urging us to find that the judge should have barred Officer Cavallone from testifying that Wilson had proclaimed "I already killed two Chicago police officers," means that the district court's error was harmless. Ante at ----. In my view, however, this misunderstands the scope of counsel's comment at oral argument. The question we must ask is whether counsel would have objected to that part of Officer Cavallone's account if the judge had granted the motion in limine at the outset. To do otherwise would undermine the central holding of the majority opinion, that an objection at trial is unnecessary to preserve for appeal an issue addressed in a definitive in limine ruling. Given the wording of the in limine motion, I believe that the damaging statement would have been improper. Wilson's lawyers asked that "all evidence of Wilson's criminal conviction for Murder, together with all reference to those criminal proceedings and to any of the underlying conduct" be excluded from the trial. Accordingly, if the motion in limine had been granted (even if it had been limited to references to victim identity), as it should have been, Wilson's lawyer would have had a ground on which to object to Officer Cavallone's statement and likely would have done so. There is no question that Wilson's lawyer would have preferred to have tried

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this case without any mention at all, through Officer Cavallone or anyone else, about the identity of Wilson's victim. Under the proper perspective, I do not regard the error as harmless. Furthermore, again harking back to the theme of most of the majority's opinion, there is an important distinction between a single mention of the identity of the victim and an incessant mantra. From that perspective as well, the error that opened the door to the mantra cannot be regarded as harmless.

*17 Despite my agreement with the broad principles concerning motions in limine that the majority announces, I would therefore reverse the judgment and remand for a new trial, and I respectfully dissent from the outcome here.

FN* Circuit Judges Flaum and Rovner did not participate in the consideration or decision of this case.

FN1. Wilson denied making this statement.

FN2. Additionally, the majority's admonition that "a judge would do well to explain in the decision proper (or in the final pretrial conference) whether the conclusion is definitive, and whether consideration at trial is required, appropriate, or forbidden," seems to build in even more problems and unduly complicate the trial. Would it not be more expedient to place the burden on attorneys to simply repeat objections at trial?

FN3. Frequently, the attorney who appears at pretrial conference is different from the trial attorney. How can the pretrial conference attorney be expected to know what will come up at trial unless he too has the latest, computerized crystal ball?

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No. 98-9828

In The

Supreme Court of the United States

MARIA SUZUKI OHLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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DOCKET ENTRIES

DATE		PROCEEDINGS
11/10/97	22	Minutes: Enter Order by Judge Jeffrey T. Miller Motion hearing held: Pending Motions and Motions in limine set for 1/26/98 at 2:00 p.m.; jury trial set for 9:00 1/27/98 for Maria Suzuki Ohler granting motion grant leave to file further motions [13-2]; granting motion for reciprocal discovery [16-1] Court Reporter: Carolyn Martin (cg) [Entry date 11/12/97]
1/13/98	23	MOTIONS IN LIMINE RE expert testimony, impeachment evidence, 404(b) evidence, demeanor of evidence, character evidence, and booking information by USA as to Maria Suzuki Ohler assigned to Judge Jeffrey T. Miller motion hrg set for 1/26/98 at 2:00 p.m. t/w prf svc (cg) [Entry date 01/13/98]
1/20/98	24	Notice of Motions in Limine and MOTIONS IN LIMINE to prevent the testimony of agents re drug courier profile, to exclude the indictment from the jury room during deliberations, for attorney voir dire by Maria Suzuki Ohler assigned to Judge Jeffrey T. Miller motion hrg set for 1/26/98 at 2:00 p.m. (cg) [Entry date 1/22/98]
1/20/98	24	Opposition by defendant Maria Suzuki Ohler to the govt's in limine motions [23-1], to [23-2], to [23-3], to [23-4], to 23-5], to [23-6] (cg) [Entry date 01/22/98]

1/20/98	25	Stmt of Facts and Memorandum of P/a's defendant Maria Suzuki Ohler in support of motions in limine to prevent the testimony of agents re drug courier profile [24-1], to exclude the indictment from the jury room during deliberations [24-2], and for atty conducted voir dire [24-3] t/w exhibits (cg) [Entry date 01/22/98]
1/26/98	27	Minutes: Enter Order by Judge Jeffrey T. Miller: Motions Hearing and Motions in Limine held. Denying dft's motion to prevent the testimony of agents re drug courier profile [24-1], granting dft's motion to exclude the indictment from the jury room during deliberations [24-2], granting dft's motion for attorney voir dire [24-3]. Granting the govt's motion testimony [23-1], denying in part and granting in part the govt's motion 404(b) evidence [23-3], granting the govt's demeanor of evidence [23-4], granting the govt's motion booking information [23-6] The govt's Motion for impeachment evidence – further briefing to be filed on 1/27/98. Pending motions hearing cont to 9:00 on 1/28/98 for Maria Suzuki Ohler; jury trial reset for 9:00 1/28/98 for Maria Suzuki Ohler Court Reporter: Debra Henson (cg) [Entry date 01/28/98]
1/27/98	29	Supplemental Briefing by defendant Maria Suzuki Ohler in opposition to in limine motion [23-2] re impeachment evidence t/w prf svc (cg) [Entry date 01/29/98]
1/27/98	30	Supplemental Briefing by plaintiff USA in support of in limine motion re use of dft;s

		[sic] prior drug conviction for impeachment evidence [23-5] (cg) [Entry date 01/29/98]
1/28/98	–	Jury Trial Began 1st day of jury trial – Voir dire begins as to Maria Suzuki Ohler, Jury impaneled as to Maria Suzuki Ohler, jury trial cont to 9:00 1/29/98 for Maria Suzuki Ohler Motions ruled on – Discovery – granted; Further Motions – granted; Govt's motion for reciprocal discovery – granted; In Limine Motion re impeachment evidence – denied; Govt's Motion in Limine re character evidence – denied. Court reporter: Debra Henson (cg) [Entry date 01/30/98] [Edit date 01/30/98]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

April 1997 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. MARIA SUZUKI OHLER, Defendant.	Criminal Case No. '97 cr 2278JM INDICTMENT Title 21, U.S.C., Secs. 952 and 960 – Importation of Marijuana; Title 21, U.S.C., Sec. 841(a)(1) – Possession of Marijuana with Intent to Distribute (Filed Aug. 6, 1997)

The Grand jury charges:

Count 1

On or about July 29, 1997, within the Southern District of California, defendant MARIA SUZUKI OHLER did knowingly and intentionally import approximately 37.23 kilograms (approximately 81.90 pounds) of marijuana, a Schedule I Controlled Substance, into the United States from a place outside thereof; in violation of Title 21, United States Code, Sections 952 and 960.

Count 2

On or about July 29, 1997, within the Southern District of California, defendant MARIA SUZUKI OHLER did knowingly and intentionally possess, with intent to

distribute, approximately 37.23 kilograms (approximately 81.90 pounds) of marijuana, a Schedule I Controlling Substance; in violation of Title 21, United States Code, Section 841(a)(1).

DATED: August 6, 1997.

A TRUE BILL:

_____

Foreperson

ALAN D. BERSIN
United States Attorney

By: _____
MICHAEL J. PEREZ
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

GOVERNMENT'S MOTIONS
IN LIMINE REGARDING:

(1) EXPERT TESTIMONY;
(2) IMPEACHMENT EVIDENCE;
(3) 404 (B) EVIDENCE;
(4) DEMEANOR OF EVIDENCE;
(5) CHARACTER EVIDENCE;
(6) BOOKING INFORMATION.

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Alan D. Bersin, United States Attorney, and Michael F. Kaplan, Special Assistant United States Attorney, and files the attached motions *in limine*.

I

STATEMENT OF FACTS

On July 29, 1997, at approximately 7:15 a.m., Maria Suzuki-Ohler (hereinafter "defendant") attempted to make entry into the United States from the Republic of Mexico via the San Ysidro, California, Port of Entry. The defendant was the driver and the sole occupant of a 1984 GMC van bearing California license plates 2K88304.

During a preprimary inspection, a Customs Inspector asked the defendant for the registration of the vehicle she was driving. The registration indicated the defendant was the owner of the vehicle. When asked, she stated that she spent the night in Tijuana and was not bringing anything back from Mexico. While inspecting the rear area of the

van, the Customs Inspector noticed signs that someone had tampered with the interior panel. When the Customs Inspector probed the panel, he initially felt resistance. As he continued to probe with a screwdriver, he felt the screwdriver puncture something behind the paneling.

At that time, the narcotic detection dog, "Salem," alerted to the panels on the left side of the vehicle and began scratching vigorously.

During a secondary inspection, 27 packages were found behind the inside panels of the van. A sample of one of the packages field tested positive for marijuana. The total weight of the packages was 81.9 pounds.

The defendant was then advised of her rights per *Miranda*. The defendant elected to exercise her rights and requested an attorney.

II

MOTIONS IN LIMINE

A. EXPERT TESTIMONY

If specialized knowledge will assist the trier-of-fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. It is within the sound discretion of the trial judge to determine whether or not expert testimony would assist in understanding the facts at issue. *United States v. Alonso*, 48 F.3d 1536, 1539 (9th Cir. 1995); *United States v. Lennick*, 18 F.3d 814, 821 (9th Cir. 1994). An expert's opinion may be based on hearsay or facts not in evidence where the facts or data relied upon are of the type reasonably relied

upon by experts in the field. Fed. R. Evid. 703. An expert may provide opinion testimony even if it embraces an ultimate issue to be decided by the trier-of-fact. Fed. R. Evid. 704.

1. Value of Drugs

In this case, the Government will use a narcotics expert to testify as to the wholesale value of the marijuana involved in this case. This testimony is relevant because the value circumstantially shows that the defendant knew marijuana was in the vehicle she was driving when arrested.

The Government also intends to present expert testimony regarding the retail value of the marijuana seized. The Ninth Circuit has previously upheld the admissibility of such expert testimony. In *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994), defendant was charged with the importation of heroin after he and others attempted to smuggle approximately 2.5 pounds of heroin across the border at the San Ysidro Port of Entry. At trial, the Government introduced the expert testimony of a DEA agent as to the street value of the heroin, assuming it had been repeatedly cut and sold on the street. Upon conviction, defendant appealed the admission of such testimony. The Ninth Circuit held that DEA agents can testify to the street value of narcotics and counsel can argue reasonable inferences from it. *Ogbuehi*, 18 F.3d at 812.

Here, as in *Ogbuehi*, testimony as to the wholesale and street value of the marijuana is relevant to defendant's knowledge and intent, and should be admitted. *See*

also, United States v. Kearney, 560 F.2d 1358, 1369 (9th Cir. 1977) (street value of narcotics relevant to defendants' knowledge of the presence of drugs); *United States v. Savinovich*, 845 F.2d 834, 838 (9th Cir. 1988) (price, quantity and quality of narcotics is relevant to defendant's intent to distribute); *United States v. Golden*, 532 F.2d 1244, 1247-1248 (9th Cir. 1987) (the price of heroin in the relevant market is admissible).

2. Evidence Regarding The Structure Of Drug Organizations

The Government intends to present expert testimony regarding generic information as to the structure of marijuana drug operations, the division of labor, drug smuggling techniques, and what constitutes a personal use amount. This testimony is proper to help the jury understand the evidence in the case and to insure that they do not decide the case in a vacuum.

This is precisely the type of evidence approved of by the Ninth Circuit in *United States v. Patterson*, 819 F.2d 1495 (9th Cir. 1987). In *Patterson*, the court permitted expert testimony that members of narcotic rings play many different roles, including street salesmen, money collectors, and lookouts. *Id.*, at 1507. Similarly, in *United States v. Maher*, the court allowed expert testimony that a defendant's actions were consistent with the modus operandi of persons transporting drugs. 645 F.2d 780, 783 (9th Cir. 1981) (per curiam). *See also United States v. Gil*, 58 F.3d 1414, 1421-1422 (9th Cir.) (permitting expert testimony as to general practice of drug traffickers to establish defendants' modus operandi).

Such expert testimony also "alerts [the jury] to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." *United States v. Johnson*, 735 F.2d 1200, 1202 (9th Cir. 1984). There are numerous cases allowing the admission of expert testimony in similar circumstances. *United States v. Taren-Palma*, 997 F.2d 525, 534 (9th Cir. 1993) (upholding expert testimony regarding the use of guns in narcotic transactions); *United States v. Gutierrez*, 995 F.2d 169, 172 (9th Cir. 1993) (permitting officers to testify that "bending, shifting, twisting, shadow, and hand moving" were "furtive" behavior by car occupants); *United States v. Bosch*, 951 F.2d 1546, 1549 (9th Cir. 1992) (IRS expert could testify that in his opinion, defendant's activities had aided and abetted the distribution of cocaine); *United States v. Jaramillo-Suarez*, 950 F.2d 1378, 1384 (9th Cir. 1991) (expert properly testified regarding drug organization's use of pay/owe sheets to keep track of customers); *United States v. Guzman*, 8439 [sic] F.2d 447 (9th Cir. 1988) (admitting expert agent's testimony that car switch is common maneuver used by narcotics traffickers); *United States v. Kinsey*, 843 F.2d 383 (9th Cir. 1988) (experts testimony about practice of drug traffickers to use women as decoys and to have load vehicle followed by person truly responsible).

Indeed, an experienced narcotics agent may testify in the form of an opinion even if that opinion is based in part on information from other agents familiar with the issue. *United States v. Golden*, 532 F.2d 1244, 1248 (9th Cir. 1976), *cert. denied*, 429 U.S. 842 (1976).

3. "Blind Mule" Testimony

Expert testimony as to whether drug traffickers are likely to entrust a valuable cargo of drugs to an unknowing courier has been specifically approved in the recent Ninth Circuit decision in *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997). In *Cordoba*, an expert witness testified that drug traffickers do not entrust a large amount of drugs to someone who doesn't know what he is transporting. On appeal, the Ninth Circuit found no error in allowing this testimony, stating that "expert testimony that drug traffickers do not use unknowing transporters was clearly probative of Cordoba's knowledge that he possessed drugs." As the Court in *Cordoba* correctly determined, testimony of this nature from a properly qualified narcotics agent is helpful to the jury in understanding the evidence or in determining an issue, the standard for admissibility under Federal Rule of Evidence 702. Such expert testimony should not be kept from the jury – which can give such testimony as little or as much weight as it deems appropriate. *See also, United States v. Morales*, ___ F.3d ___, No. 94-10507 (*en banc*), (9th Cir. March 5, 1997) (Expert may testify even if jury might infer *mens rea* from testimony).

The type of testimony admitted in *Cordoba* has been approved of in other Ninth Circuit cases. In *United States v. Castro*, 972 F.2d 1107 (9th Cir. 1992), the Ninth Circuit cited, as evidence sustaining the conviction of a defendant for cocaine possession, expert testimony that traffickers would never have entrusted a large amount of cocaine to "an unknowing dupe." *Id.* at 111.

Finally, Courts of Appeal in other Circuits have upheld the admissibility of just the sort of testimony approved of in *Cardoba, Castro* and *Lockhart*. In *United States v. Willis*, 61 F.3d 526 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 2528 (1995), the Seventh Circuit upheld the admissibility of testimony from a Drug Enforcement Agency agent that he had never arrested an individual or participated in a drug transportation case where the courier did not know what he was transporting. *Id.* at 533-34. Similarly, in *United States v. Richard*, 969 F.2d 849 (10th Cir. 1992), the Tenth Circuit upheld the admissibility of the testimony of a police officer that, based upon his experience, drug dealers will not invite others to participate in a large narcotics transaction who are not aware of the nature of the transaction. *Id.* at 855.

In this case, the defendant was arrested while driving a vehicle containing approximately 81.9 pounds of marijuana across the border into the United States (one of the most critical points in the chain of distribution). This marijuana has an approximate wholesale value of $41,000 and an approximate street value of $78,000. Under *Cordoba*, and the other cases cited above, testimony that drug traffickers would not entrust a valuable cargo of drugs such as this to an unknowing courier is clearly relevant, admissible and probative as to whether the defendant here had knowledge that she possessed drugs.

The Government does not intend to introduce "drug courier profile" evidence, as that term is properly defined under Ninth Circuit case law. However, even though such testimony is generally precluded, the Ninth Circuit recognizes an exception where the defendant "opens the door" to such testimony. *United States v. Lim*, 984 F.2d 331, 335

(9th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2944 (1993); *United States v. Baron*, ___ F.3d ___, 96 D.A.R. 10815 (9th Cir. Sept. 4, 1996). That door may be opened through the defendant's cross-examination of the Government's witness, *United States v. Beltran-Rios*, 878 F.2d 1208, 1210-13 (9th Cir. 1989); *United States v. Taylor*, 716 F.2d 701, 710 (9th Cir. 1983), or the defense introduction of negative profile testimony, i.e., evidence suggesting that the defendant possesses certain characteristics inconsistent with an inference of guilt. *United States v. Sotelo-Murillo*, 887 F.2d 176, 183 (9th Cir. 1989).

B. IMPEACHMENT EVIDENCE

The Government hereby notifies Defendant of its intention to offer the following conviction at trial under Federal Rule of Evidence 609(a)(1): Defendant was convicted of the felony offense of Possession of a Controlled Substance, in violation of California Health and Safety Code Section 11377(A), on June 29, 1993, and sentenced to 90 days jail and three years probation. Therefore, if Defendant testifies, the Government intends to use this conviction to impeach her.

Rule 609 provides that evidence of prior felony convictions is admissible for the purpose of attacking the credibility of a witness if the prejudicial effect of the evidence is outweighed by its probative value. Rule 609 provides:

> For the purpose of attacking the credibility of a witness, . . . evidence that an accused has been convicted of a crime (punishable by death or imprisonment in excess of one year) shall be

> admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. . . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement . . .

Fed. R. Evid. 609(a)(1).

In this case, it is anticipated that Defendant will claim that she was simply an unwitting driver who had no idea that the van she drove across the border contained narcotics. Thus her credibility is squarely at issue. The Government should not be prevented from demonstrating Defendant's lack of trustworthiness. *See United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979) (*en banc*), *cert. denied*, 444 U.S. 1034 (1980), *overruled on other grounds, Luce v. United States*, 469 U.S. 38 (1984) (holding that the Government should not be prevented from providing information to the jury that undercuts defendant's trustworthiness). Thus, evidence of her prior felony conviction should be available for use by the Government to impeach Defendant should she choose to testify at trial.

Additionally, the Government intends to impeach the defendant, should she decide to testify, with evidence that she lied to pretrial services during her initial visit on August 8, 1997. Evidence that the defendant has previously lied in connection with this case is permissible impeachment evidence under Fed.R.Evid. 608(b) which provides in pertinent part:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may . . . if probative of truthfulness or untruthfulness, be inquired into

> on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . .

Fed.R.Evid. 608(b).

During defendant's initial visit with pretrial services, she informed Jeff Larsen, her pretrial services officer, that she had not used any drugs since completing drug rehabilitation in 1995. However, during pretrial release and subsequent to her initial visit to pretrial services, the defendant tested positive for methamphetamine on two separate occasions. Additionally, the defendant admitted before Magistrate Judge Aaron to testing positive for methamphetamine.

Therefore, should defendant elect to testify, questioning regarding her statement to pretrial services regarding her drug use should be permissible on cross-examination as evidence of untruthful character.

C. 404(b) EVIDENCE

Under Fed.R.Evid. 404(b), evidence of other crimes, wrongs, or acts is admissible if relevant to "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Rule 404(b) is a rule "of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove *only* criminal disposition." *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977) (emphasis in original). *Accord United States v. Ayers*, 924 F.2d 1468, 1472 (9th Cir. 1991); *Heath v. Cast*, 813 F.2d 254, 259 (9th Cir.); *United States v. Herrell*, 588 F.2d 711, 714

(9th Cir. 1978); *United States v. Sangrey*, 586 F.2d 1312, 1314 (9th Cir. 1978); *United States v. Riggins*, 539 F.2d 682, 683 (9th Cir. 1976). Indeed, Congress was not nearly so concerned with the prejudicial effect of Rule 404(b) evidence as it was with insuring "that restrictions would not be placed on the admission of such evidence." *United States v. Huddleston*, 485 U.S. 681, 688-89 (1988). Rule 404(b) therefore bars the introduction of evidence concerning prior criminal conduct or other bad acts by the defendant *only* if offered for the purpose of proving the defendant's bad character and implying that he acted in accordance with that bad character in the instant case.

In this case, the Government intends to introduce evidence of defendant's methamphetamine use to show her motive for smuggling marijuana, to obtain money to support her drug habit. Additionally, evidence of her prior felony drug conviction demonstrates that she had knowledge of the marijuana concealed in her van.

The admissibility of evidence under Rule 404(b) is evaluated using a four-part test. First, the evidence must tend to prove a material point at issue. Second, it must not be too remote in time. Third, the proof must be sufficient to support a finding that the defendant committed the other act. Fourth, in some cases, the prior act must be similar to the offense charged. However, the Ninth Circuit has generally ruled that similarity is not required if the defendant's knowledge is the issue. *United States v. Santa-Cruz*, 48 F.3d 1118, 1119 (9th Cir. 1995); *United States v. Corona*, 34 F.3d 876, 881 (9th Cir. 1994); *United States v. Arambula-Ruiz*, 987 F.2d 599, 603 (9th Cir. 1993). If these elements are satisfied, the court must then balance the probative value of the evidence against any prejudicial

effect. *United States v. Rude*, 88 F.3d 1538, 1549 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 690 (1997); *Corona*, 34 F.3d at 881; *United States v. Spillone*, 879 F.2d 514, 519 (9th Cir. 1989). Here the Government's evidence meets all elements of the test, and the prejudicial effect of the evidence does not substantially outweigh its probative value.

Evidence of the defendant's methamphetamine use is relevant to proving she had a motive for smuggling marijuana, to obtain money to support her habit, and the intent to distribute the marijuana. On August 8, 1997, the defendant reported to pretrial services as directed by Magistrate Judge Aaron. She informed pretrial services officer Jeff Larsen that prior to 1995, she used methamphetamine approximately two to three times per week. In 1995, according to the defendant, she received treatment for her habit, and since that time, has not used any drugs. However, while on pretrial release and subsequent to that discussion with Jeff Larsen, the defendant tested positive on two occasions for methamphetamine. Additionally, on October 7, 1997, in a hearing before Magistrate Judge Aaron, the defendant admitted to charges in an Order to Show Cause that she tested positive for methamphetamine.

Evidence of defendant's methamphetamine habit supports the reasonable inference that her motive for smuggling 81.9 pounds of marijuana was to obtain money to support her drug habit. Additionally, such evidence supports the inference that in order to obtain money for her smuggling activity, the defendant must first deliver the marijuana to another person(s). Both defendant's knowledge and intent to deliver the drugs are material to

this case and satisfy the first prong of the 404(b) test as outlined above. Reasoning along this same line, the Ninth Circuit has permitted the use of evidence of a defendant's heroin habit to demonstrate his motive to commit a bank robbery, *e.g., United States v. Miranda,* 986 F.2d 1283, 1285 (9th Cir.), *cert. denied,* ___ US. ___, 113 S.Ct. 2393 (1993), and the use of evidence of a defendant's cocaine trafficking activities to show his motive for concealing money and failing to file a currency report. *United States v. Conners,* 825 F.2d 1384 (9th Cir. 1987).

With respect to the admissibility of defendant's prior felony drug conviction, the Ninth Circuit has "consistently held that evidence of a defendant's prior possession or sale of narcotics is relevant under 404(b) to the issue of intent, knowledge, motive, opportunity, and absence of mistake or accident in prosecutions for possession of, importation of, and intent to distribute narcotics." *United States v. Mehrmanesh,* 689 F.2d 822, 832 (9th Cir. 1982). In *United States v. Rocha,* 553 F.2d 615, 616 (9th Cir. 1977), the court held, "[a]ppellant's possession of marijuana in the prior case clearly tended to show that he knew about marijuana in the present case and had illegal intent." Such a prior conviction is "highly probative as to knowledge and intent." *United States v. Sigal,* 572 F.2d 1320, 1323 (9th Cir. 1978). *See also, United States v. Robertson,* 15 F.3d 862, 871 (9th Cir. 1994) (stating evidence of a defendant's prior drug possession is "relevant and admissible to establish his intent to distribute.").

The second requirement, that the previous conduct not be to [sic] remote in time, is easily met here. During defendant's pretrial release, she tested positive for methamphetamine on two occasions, August 8, 1997, and

August 12, 1997, and admitted to this violation of pretrial release on October 7, 1997. With respect to defendant's conviction for possession of a controlled substance, she was convicted on June 29, 1993, well within the 10 year time period provided for in Fed. Rule Evid. 609(b). *See United States v. Rude,* 88 F.3d 1538, 1550 (eight years not too remote); *United States v. Ono,* 918 F.2d 1462, 1465 n. (9th Cir. 1990) (seven-year-old conviction admissible); *United States v. Ross,* 886 F.2d 264, 267 (9th Cir. 1989) (thirteen-year-old conviction admissible); *Spillone,* 879 F.2d at 518 (seventeen years not too remote).

The evidence also satisfies the third requirement, that it be sufficient to support a finding that the defendant committed the prior act. On August 8, 1997, as previously noted, the defendant reported to pretrial services as directed by the court. At that time, she informed pretrial services that she had an illicit history of drug use. This, in addition to her admission to testing positive for methamphetamine during pretrial release, provides ample evidence that she has a drug habit. In addition, with regard to defendant's 1993 conviction for possession of a controlled substance, the Government will provide a certified copy of the judgement and commitment order. As discussed above, because the primary issue at bar is whether the defendant knew there was marijuana in her van when she crossed the border at San Ysidro, it is not necessary for the United States to establish that her previous act of possession of a controlled substance is factually similar to the charged conduct.

Finally, although admissible under Rule 404(b), evidence of the defendant's methamphetamine use and felony drug conviction must still satisfy the Fed.R.Evid. 403

balancing test. The balancing of probative value versus unfair prejudicial effect is, of course, committed to the discretion of the Court. *E.g., United States v. Multi-Management, Inc.*, 743 F.2d 1359, 1364 (9th Cir. 1984). Nonetheless, the evidence should be excluded only if "the effect on the jury of the non-probative aspect of the evidence is likely to be *substantially greater* than the effect of the probative aspect . . . " *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982) (emphasis added). The non-probative aspect of the evidence is that aspect which makes conviction more likely because it provokes an emotional response in the jury. *Id.*

The evidence of defendant's drug use is highly probative of the defendant's guilt. The evidence demonstrates motive, intent, and knowledge. When viewed in the light of human experience, it is more probable that a person with a motive to commit a crime will commit that crime. In establishing the defendant's motive for smuggling marijuana, the evidence undoubtedly prejudices the defendant, but "evidence relevant to a defendant's motive 'is not rendered inadmissible because it is of a highly prejudicial nature . . . The best evidence often is.' " *United States v. Parker*, 549 F.2d 1217, 1222 (9th Cir.), *cert. denied*, 430 U.S. 971 (1977) (quoting *United States v. Mahler*, 452 F.2d 547, 548 (9th Cir. 1971), *cert. denied*, 405 U.S. 1069 (1972)). Rule 403 proscribes only *unfair* prejudice, *e.g., United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989), and the Court can prevent any *unfair* prejudice with a limiting instruction. *E.g., United States v. Manning*, 56 F.3d 1188 (9th Cir. 1995) (emphasis added).

For the reasons previously stated, evidence of defendant's felony drug conviction and drug use show her motive for smuggling, her knowledge of the marijuana concealed in her van, and her intent to deliver the marijuana to another person(s). Therefore, pursuant to Fed.R.Evid. 404(b), this evidence is admissible.

D. DEMEANOR EVIDENCE ADMISSIBLE

Evidence regarding defendant's demeanor and physical appearance is admissible as circumstantial evidence helpful to the jury's determination as to whether or not the defendant knew that drugs were concealed in the car. Fed. R. Evid. 701; *United States v. Mastberg*, 503 F.2d 465, 470 (9th Cir. 1974) (Government agents could properly testify as to defendant's nervousness). Here, Government agents had the opportunity to watch defendant as they asked her questions and informed her of facts relating to the offenses charged. Since these agents have personal knowledge, the evidence is admissible under Rule 602. In *United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991), the Ninth Circuit concluded that defendant's actions both before and after the discovery of the drugs supported a finding of guilt. These actions included "acting disinterested and not helping in the search" and, when the inspector found the drugs, defendant "stepped away without attempting to see to what the inspector was referring. . . . " *Id.* at 848, n.2. Lastly, if Government agents testify regarding a defendant's demeanor, that defendant will have an opportunity to confront and cross-examine the agents as guaranteed by the Sixth

Amendment to the United States Constitution. Thus, testimony regarding defendant's demeanor and physical appearance is admissible.

E. IMPROPER CHARACTER EVIDENCE

The defendant may properly present character evidence as to defendant's general reputation as a law-abiding individual. However, the defendant may *not* introduce evidence of specific instances of good conduct. This distinction is clearly set out in Federal Rule of Evidence 405 and the cases interpreting it. *See* Rule 405(a); *See also Michelson v. United States*, 335 U.S. 469, 477 (1948) (character evidence may not include personal observations or knowledge, nor testimony as to defendant's specific acts or courses of conduct); *United States v. Hedgcorth*, 873 F.2d 1307 (9th Cir. 1989) (improper to allow defendant to offer evidence of specific acts to show character of law abidingness or patriotism).[1]

The only reason defendant seeks to introduce this evidence is to unfairly taint the jury. The defendant should not be allowed this opportunity.

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[1] Evidence of specific acts as proof of character is allowed under Federal Rule of Evidence 405(b) only where character in the strict sense is at issue in a case. *See, e.g., United States v. Webster*, 649 F.2d 346 (5th Cir. 1981) (specific instances of conduct regarding predisposition where defense was entrapment).

F. ROUTINE BOOKING INFORMATION ADMISSIBLE

In this case, Customs Officials asked the defendant routine booking questions for the purpose of obtaining background information. The questions asked were standard background questions designed to complete a personal history and intake report. The United States Supreme Court has held that routine booking questions reasonably related to law enforcement record keeping concerns are not testimony and are therefore outside the Fifth Amendment privilege the *Miranda* is designed to protect. *Pennsylvania v. Muniz*, 496 U.S. 582, 600-602 (1990). Therefore, defendant's responses to agent's routine booking questions are admissible. *See United States v. Perez*, 776 F.2d 797, 799 (9th Cir. 1985).

III

CONCLUSION

For the foregoing reasons, the Government's motions *in limine* should be granted.

DATED: January 13, 1998.

Respectfully submitted,

ALAN D. BERSIN
United States Attorney

/s/ Michael F. Kaplan
MICHAEL F. KAPLAN
Special Assistant
U.S. Attorney

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

NOTICE OF MOTIONS *IN LIMINE* AND MOTIONS *IN LIMINE* TO:

1) PREVENT THE TESTIMONY OF AGENTS REGARDING DRUG COURIER PROFILE;

2) EXCLUDE THE INDICTMENT FROM THE JURY ROOM DURING DELIBERATIONS;

3) FOR ATTORNEY CONDUCTED VOIR DIRE, and OPPOSITION TO THE GOVERNMENT'S MOTIONS IN LIMINE

TO: ALAN D. BERSIN, UNITED STATES ATTORNEY, AND MICHAEL KAPLAN, SPECIAL ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on January 26, 1998, at 2:00 p.m., or as soon thereafter as counsel may be heard, the accused, Maria Ohler, by and through her counsel, S. Todd Neal and Federal Defenders of San Diego, Inc., will hereby move this Court to grant the above-entitled motions.

MOTIONS

The accused, Maria Ohler, by and through her attorneys, S. Todd Neal and Federal Defenders of San Diego,

Inc., hereby files the attached motions *in limine* of facts and law relating to this case. They are as follows:

1) prevent the testimony of agents regarding drug courier profile;

2) exclude the Indictment from the jury room during deliberations;

3) attorney conducted *voir dire*.

In addition, these motions contain Ms. Ohler's response and opposition to Motions In Limine #1-6 filed by the government. These motions are based upon the attached statement of facts and memorandum of points and authorities, the files and records in the above-captioned matter, and any and all other evidence brought before this Court before or during the hearing on these motions.

Respectfully submitted,

Dated: January 20, 1998

/s/ S. Todd Neal
S. TODD NEAL
Federal Defenders of
San Diego, Inc.
Attorneys for Ms. Ohler

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

STATEMENT OF FACTS AND MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS IN LIMINE

I.

STATEMENT OF FACTS

Ms. Ohler hereby incorporates by reference the Statement of Facts contained in her motions filed on September 22, 1997.

II.

EXPERT TESTIMONY FROM THE AGENTS REGARDING "DRUG COURIER PROFILE" SHOULD NOT BE ALLOWED

The government should be precluded from presenting opinion evidence from agents regarding the "drug courier profile." The Federal Rules of Evidence, specifically Rule 702, allows the admission of opinion evidence if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . and the witness is qualified as an expert" (emphasis added). The Supreme Court has defined drug courier profile as "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics." *Reid v. Georgia*, 448 U.S. 438, 440 (1979) (*per curiam*).

Although such profiles may be used as the basis for investigatory stops, *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581-1586 (1989), that, in and of itself, does not mean that such profile evidence is admissible at trial. *See United States v. Beltran-Rios* 878 F.2d 1208, 1211 (9th Cir. 1989). As was pointed out by the Ninth Circuit in that case,

> [d]rug courier profiles are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers . . . *Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity.* Drug courier profile evidence is nothing more than the opinion of those officers conducting an investigation . . . [W]e denounce the use of this type of evidence as substantive evidence of the defendant's innocence or guilt.

Id. at 1210 (9th Cir. 1989) (quoting *United States v. Hernandez-Cuartas* 717 F.2d 552, 555 (11th Cir. 1983)) (emphasis added).

In *Beltran*, the Court approved the use of such testimony only as rebuttal evidence, emphasizing "that the holding in this case is a relatively narrow one. The Government may introduce profile testimony of this sort only to rebut specific attempts by the defense to suggest innocence based on the particular characteristics described in the profile." *Beltran*, 878 F.2d at 1213 n.2. (emphasis added). In the absence of testimony that specifically attempts to suggest innocence based on the profile characteristics, such testimony must be precluded.

Likewise, this type of evidence is not admissible to explain the *modus operandi* of the defendant. The Ninth Circuit has stated that, "[w]hile it may be appropriate to recognize a modus operandi exception in certain cases, such as those involving *complex* drug smuggling conspiracies," it is inappropriate where there is no complex criminal scheme. *United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991) (emphasis added).

The government has no need to explain a complex criminal scheme in order to prosecute Ms. Ohler. Ms. Ohler was arrested at the border driving a van found to contain approximately 81.9 pounds of marijuana. The government is not alleging or charging that Ms. Ohler is at the heart of a sophisticated smuggling ring, or running a multi-spoke drug conspiracy. The government is merely alleging importation and possession with intent to distribute, neither of which is a "complex" issue under the facts of this case. Therefore, the evidence of the agents regarding drug courier profile should not be permitted under the *modus operandi* exception.

III.

THIS COURT SHOULD NOT SEND THE INDICTMENT INTO THE JURY ROOM DURING DELIBERATIONS

The Ninth Circuit Model Jury Instructions were revised on April 27, 1996. In the commentary to Model Instruction 3.02.01, "Charge Against Defendant Not Evidence," the Committee on Model Jury Instructions has strongly recommended that the Indictment not be sent

into the jury room during deliberations. A copy of this specific revision is attached as Exhibit A.

Ms. Ohler urges this Court to follow the guidance of the Committee. As the commentary states, indictments are frequently phrased in the language of the statute. The language in the instant Indictment does indeed "track" the language of the charged statutes. Accordingly it is highly possible that jurors could be persuaded by the similarities alleged in the Indictment returned by the grand jury and the elements which must be proven in the charged statute. As the Indictment, by law, is proof of nothing in a criminal trial, it would be prejudicial and legally improper for a jury to be persuaded in this manner.

Ms. Ohler further asserts that sending the Indictment into the jury room allows the prosecutor to usurp the judge's role of instructing the jury on what is the applicable law. For this reason, Ms. Ohler also requests that the Court read the Indictment to the jury rather than allowing the prosecutor to usurp the authority of the Court in this manner. As the Ninth Circuit committee stated, the judge, not the prosecutor, should tell the jury what the charge is against the defendant and what the government must prove to establish guilt.

IV.

MOTION FOR ATTORNEY-CONDUCTED VOIR DIRE

Pursuant to Rule 24(a) of the Federal Rules of Criminal Procedure, defense counsel expressly requests the opportunity to personally *voir dire* the prospective jurors

so that Ms. Ohler may exercise her right to be tried fairly by an impartial jury in accordance with the Fifth and Sixth Amendments to the United States Constitution. Counsel requests fifteen minutes of personal *voir dire* in order to make reasonable inquiry of the jurors' perceptions regarding certain facts related to the government's prosecution and defendant's theory of the case.

A. Defendant Must Have A Fair, Impartial Jury

A defendant's right to a fair and impartial jury is guaranteed by the Constitution and is a fundamental predicate to a fair trial. The right to a fair and impartial jury is protected by the Fifth and Sixth Amendments. *Duncan v. Louisiana,* 391 U.S. 145 (1968). To permit an individual to be convicted on the basis of a proceeding tainted by bias and prejudice would violate the most basic values of our criminal justice system.

Many courts have also recognized that the right to a impartial jury entails the right to take reasonable steps designed to insure that the jury is impartial. *Ham v. South Carolina,* 409 U.S. 524, 532 (1973) (Marshall, J., concurring in part and dissenting in part). One of the most important means to insure an impartial jury is the right to strike those jurors who manifest an inability to try a case solely on the evidence. This right to exclude incompetent jurors cannot be exercised meaningfully or effectively unless counsel has sufficient information with which to evaluate members of the venire. *Turner v. Murray,* 476 U.S. 28 (1986). The range of inquiry in the quest to empanel a fair and impartial jury should be liberal. *United States v. Napoleone,* 349 F.2d 350, 353 (3d Cir. 1965).

Courts have not hesitated to reverse a conviction where limitations on *voir dire* have unreasonably infringed on a defendant's right to a neutral and impartial jury. *See Cook v. United States,* 379 F.2d 966 (5th Cir. 1967); *United States v. Baldwin,* 607 F.2d 1295 (9th Cir. 1979); *Turner v. Murray,* 476 U.S. 28 (1986); *Aldridge v. United States,* 283 U.S. 308; *United States v. Washington,* 819 F.2d 221 (9th Cir. 1987. As noted by Justice White in *Rosales-Lopez v. United States,* 451 U.S. 182, 183 (1981).

> [A]ny system for the empaneling of a jury that [prevents] or embarrasses the full unrestricted exercise by the accused of that right, must be condemned.

The need to determine the jurors' perceptions and biases is necessary to ensure Ms. Ohler a fair and wholly impartial jury.

B. Ms. Ohler Cannot Exercise Her Challenges Meaningfully Unless She Has Attorney Voir Dire.

Rule 24(a) of the Federal Rules of Criminal Procedure provides that the court may permit the parties to conduct the examination of the jurors or may elect to conduct the examination itself. Fed. R. Crim. P. 24(b) provides the government with six peremptory challenges and the defendant with ten peremptory challenges. While Fed. R. Crim. P. 24(a) allows the trial court wide discretion in conducting *voir dire, voir dire* may have little meaning if it is not conducted at least in part by counsel. In *United States v. Ible,* 630 F.2d 389, 395 (5th Cir. 1980), the Court articulates the difference between court and attorney *voir dire*. The court stated:

> The "federal" practice of almost exclusive *voir dire* examination by the court does not take in to account the fact that it is the parties, rather than the court who have a full grasp of the nuances of the strength and weaknesses of the case. Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes.

(quoting in part *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977)) (other citations omitted).

Federal courts have been concerned about the practice of attorney-conducted *voir dire* for fear that participation of counsel would require more time than *voir dire* conducted by the court alone. However, an attorney's familiarity with the case can also lead counsel to frame more narrowly focused questions which are more directly on point, and can in fact expedite the *voir dire* process.

Attorney-conducted *voir dire* can be a much better tool for eliciting bias and prejudice than is judge-conducted *voir dire*. The judge is the most highly respected authority figure in the courtroom. Court-conducted *voir dire* often involves leading questions suggesting the proper answer in the question. Since jurors have a desire to be liked and accepted by the judge they may mold their answers accordingly.

As the National Jury Project authors have noted:

> Most people seek approval and are predisposed to acquiesce to authority figures. When asked to evaluate themselves in the best possible or most "socially desirable light" . . . these tendencies increase when the questionnaire is a person of

> substantially higher status then the respondent. This phenomenon is compounded by the fact that the judge's perceived as an impartial and benevolent authority.

National Jury Product, *Jury Work: Systematic Techniques*, p. 37 (1978). Typically, court-conducted *voir dire* is a quick drill of questions which lead the witness to a "proper" response, rather than an heartfelt one.

If counsel in this case is allowed personal *voir dire*, counsel would attempt to draw out the jurors' biases and misconceptions in order to determine whether any jurors in the venire are unable to judge Ms. Ohler fairly. It is doubtful whether this goal could be achieved without attorney *voir dire*.

V.

RESPONSE AND OPPOSITION TO MOTIONS IN LIMINE FILED BY THE GOVERNMENT

A. THIS COURT SHOULD LIMIT THE EXPERT TESTIMONY PROPOSED BY THE GOVERNMENT

The government has expressed an intention to offer expert testimony on several issues. With respect to expert testimony with regard to the wholesale and retail value of the drugs, Ms. Ohler requests that the testimony be confined to wholesale value. It will presumably be the government's theory at trial that Ms. Ohler was knowingly transporting this load of marijuana across the border in order to deliver it to another person. If this is the case, then only testimony concerning wholesale value is relevant because Ms. Ohler would not be reaping the profits of any retail sales. Whatever probative value exists as to

knowledge would only apply up to the point where Ms. Ohler's participation ends. Accordingly, the value of the marijuana at the point where it is "delivered" to the party who was going to sell it at the retail level is the only value that is factually relevant – that is the wholesale value.

This argument is further supported by the cases cited in the government's motion. The cases cited by the government, notably *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994), involved typically heroin cases where law enforcement agents were permitted to testify with respect to how street value is impacted by cutting the drugs or by the quality of the drugs. As this case involves marijuana, rather than heroin or methamphetamine, such testimony is not necessary. For these reasons, Ms. Ohler requests that this Court restrict the testimony to wholesale value only.

The government has also indicated an intention to introduce testimony regarding the structure of drug organizations. Ms. Ohler refers to her motion to preclude testimony concerning drug courier profile testimony. Ms. Ohler simply requests that this Court rule on these matters as the testimony is elicited and objections are made at trial.

Citing *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997), the government intends to offer expert testimony that drug traffickers do not entrust a large amount of drugs to someone who doesn't know what he is transporting. In other words, the government would like to introduce testimony that Ms. Ohler had the requisite *mens rea*. This would directly violate Federal Rule of Evidence

704(b) by invading the province of the jury on the ultimate issue. Such testimony would essentially direct a guilty verdict.

In addition, this case is easily distinguishable from *Cordoba*. This case involves 81 pounds of marijuana that the government claims has a wholesale value of $41,000. *Cordoba* involved **over 300 kilograms** of cocaine. The government cannot point to a single 9th Circuit case involving a similar amount of marijuana where such testimony was deemed admissible. As *Cordoba* and the government argue that it is the **value** of the load of drugs that makes it probative of the defendant's knowledge of the presence of the drugs, the tremendous disparity of the value of the load in *Cordoba* compared to the load in this case belies the specious nature of the government's argument. Accordingly, the government should be prohibited from offering expert testimony that drug traffickers do not entrust loads of narcotics to unknowing transporters.

VI.

MS. OHLER'S PRIOR CONVICTION IS INADMISSIBLE FOR IMPEACHMENT PURPOSES PURSUANT TO FEDERAL RULE OF EVIDENCE 609 BECAUSE IT HAS NOT BEEN SHOWN TO HAVE BEEN PUNISHABLE BY IMPRISONMENT IN EXCESS OF ONE YEAR

Ms. Ohler suffered a conviction for a violation of California Health and Safety Code 11377(a) on June 29, 1993. Ms. Ohler was sentenced to 90 days custody and 3 years probation. The government intends to impeach Ms. Ohler with this conviction if she testifies. In the absence of proof that Ms. Ohler pled guilty to the felony version

of 11377(a) that is punishable by a term of imprisonment in excess of one year, the proposed impeachment is inadmissible according to the plain language of Federal Rule of Evidence 609.

Rule 609(a)(1) explicitly states that evidence that the accused has been convicted of a crime (subject to Fed R. Evid. 403 balancing test) "if the crime was punishable by death or imprisonment *in excess of one year under the law under which the witness was convicted.*" Health and Safety Code Section 11377(a) is a state court "wobbler" that can be charged as either a misdemeanor or a felony. To date, no Judgment & Commitment Order has been provided by the government indicating exactly whether Ms. Ohler's conviction was for a felony or a misdemeanor. As such, the threshold requirements for admissibility of this prior conviction for impeachment purposes under Federal Rule of Evidence 609 have not been met. Unless and until these requirements are fulfilled, Ms. Ohler objects to the use of this prior conviction under Fed. R. Evid. 609.

VII.

EVIDENCE OF MS. OHLER'S ALLEGED "DRUG HABIT" IS INADMISSIBLE UNDER FEDERAL [RULE] OF EVIDENCE 404(B)

The government intends to introduce evidence of Ms. Ohler's methamphetamine use "to show her motive for smuggling marijuana, to obtain money to support her drug habit." In support of their contention that Ms. Ohler has a drug habit, the government points to her sole criminal conviction for Possession of a Narcotic Substance, and to 2 positive tests submitted by Ms. Ohler

while on Pre-Trial release in this case. What the government fails to recognize is that Ms. Ohler, who drug tests 3 times per week with Pre-Trial Services, has tested clean well in excess of *50 times* while these charges have been pending. Accordingly, there is clearly insufficient evidence to find that Ms. Ohler actually has a drug habit to the extent that it would provide a motive for smuggling marijuana. Furthermore, the applicable case law and Federal Rule of Evidence 403 preclude the admission of such highly prejudicial and minimally probative evidence.

Federal Rule of Evidence 403 prohibits the admission of evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice has been defined as crating [sic] a tendency that the jury may decide the case on an emotional basis. *Los Angeles Police Protective League v. Gates*, 907 F.2d 879 (9th Cir. 1990). In the instant case, while there is admittedly evidence that Ms. Ohler has used drugs in the past and may have even have had a drug problem, there is no evidence to establish a drug dependency that would support a reasonable inference that she needs to drive loads across the border to support her drug habit. Accordingly, the proffered evidence has no rational nexus with motive.

United States v. McDonald, 905 F.2d 871 (5th Cir. 1990) is directly on point. Customs agents arrested McDonald as he tried to cross the border in El Paso, Texas with 70 pounds of marijuana in the gas tank and back seat of his car. McDonald was convicted after jury trial of importation of marijuana and possession of marijuana with intent to distribute. *Id.* at 873. On appeal, the 5th Circuit held that it was error for the trial court to permit the prosecutor to cross-examine McDonald about his past drug use.

The 5th Circuit held that drug usage was not probative of truthfulness and that evidence of McDonald's past usage was not relevant to determine whether he knowingly transported the marijuana on the date of his arrest. *Id.* at 875.

As the *McDonald* court noted, it is a large leap in rational inferences to conclude that because Ms. Ohler has used methamphetamine in the past she therefore likely knew her van contained marijuana on July 29, 1997. Where the probative value of proffered Fed. R. Evid. 404(b) evidence is very slight and there is merely a modest likelihood of unfair prejudice, the 9th Circuit has held that it is an abuse of discretion for the 404(b) evidence to be admitted. *United States v. Hitt*, 981 F.2d 422 (9th Cir. 1992). As there is, at best, minimal probative value to be gained from admission of Ms. Ohler's past drug usage, due to the substantial prejudice that would result, the government should be precluded from introducing this evidence.

VIII.

PURSUANT TO DOYLE V. OHIO THE GOVERNMENT MUST BE PRECLUDED FROM INTRODUCING EVIDENCE OF MS. OHLER'S SILENCE AFTER SHE HAD BEEN PLACED UNDER ARREST

In Motions In Limine filed by the government, the intent to elicit testimony from arresting agents regarding demeanor evidence has been given. Specifically, the government states that "government agents had the opportunity to watch defendant as they asked her questions and informed her of facts relating to the offenses

charged." (Pg. 16 of Government's Motions In Limine). The government intends to elicit testimony from the agents regarding Ms. Ohler's demeanor during this time period.

A. Ms. Ohler's Due Process Rights Will Be Violated If The Government Introduces Evidence that She Exhibited No Physical Reaction After Being Placed Under Arrest

It is a fundamental principle of due process that the government cannot use, at trial, a defendant's post-*Miranda* silence as substantive evidence of guilt. *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995) (quoting *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976), "It does not comport with due process to permit the prosecution during trial to call attention to [the defendant's] silence."). Silence in the wake of *Miranda* warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Permitting the use of a defendant's silence to impeach or argue an inference of guilt, when the silence is at the time of arrest and after receiving *Miranda* warnings, violates the due process clause of the fourteenth Amendment because *Miranda* warnings contain an implicit guarantee that silence will carry no penalty. *Id.* at 619 (quoting *United States v. Hale*, 422 U.S. 171, 182-83 (1975)).

Ms. Ohler objects to any violation of her 5th Amendment rights. If the government introduces evidence that after being placed under arrest Ms. Ohler did not look surprised or she "just sat there," this will violate her right to due process of law. This Court should order the government to avoid attempting to elicit testimony that

would violate the Supreme Court rule set forth in *Doyle v. Ohio*.

IV.

IMPROPER CHARACTER EVIDENCE

Ms. Ohler has no objection to the government's motion.

X.

MS. OHLER HAS NO OBJECTION TO THE ADMISSION OF ROUTINE BOOKING INFORMATION BUT ANY REFERENCE TO DRUG USAGE OR WELFARE STATUS SHOULD BE PRECLUDED AS UNDULY PREJUDICIAL PURSUANT TO FEDERAL RULE OF EVIDENCE 403

Ms. Ohler concurs that responses to routine booking questions are not protected by the 5th Amendment. However, the Federal Rules of Evidence still apply and pursuant to Fed. R. Evid. 403 any evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. For the aforementioned reasons, Ms. Ohler's past drug usage is not probative of any material element in this case. Unless Ms. Ohler somehow opens the door to this evidence, it should not be admitted.

Similarly, any evidence of receiving welfare would only serve to prejudice Ms. Ohler and deprive her of a fair trial. For obvious reasons jurors who are taxpayers might be resentful toward a defendant who receives welfare. As the receipt of welfare does not tend to make the existence of any fact of consequence more or less likely, it

is not relevant. Fed. R. Evid. 401. For these reasons, the government should be precluded from introducing this evidence.

XI.

CONCLUSION

For the foregoing reasons the defense requests that the Court grant Ms. Ohler's motions *in limine*.

DATED: January 20, 1998

Respectfully submitted,

/s/ S. Todd Neal
S. TODD NEAL
Federal Defenders of
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[Exhibit Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In Limine Hearing before the Honorable Jeffrey T. Miller

[Caption Omitted In Printing]

[2] San Diego, California – Monday, January 26, 1998

THE CLERK: Case number 15, 97-2278, United States of America versus Maria Ohler for motion hearing and motions in limine.

MR. NEAL: Good afternoon, your Honor. Todd Neal, Federal Defenders, on behalf of Ms. Ohler, who is present on bond.

MR. KELLY: Your Honor, good afternoon. Kevin Kelly on behalf of the United States. Your Honor, I apologize for the – sort of the new face in the courtroom – for rather short notice. The Assistant assigned to the case previously, Michael Kaplan, has been called away this week, so I will be taking the case.

THE COURT: All right. What is the status of the case at this time, counsel?

MR. NEAL: Your Honor, we're still intending to go to trial in this case.

THE COURT: All right. Are there any motions that need to be addressed at this time?

MR. NEAL: There are a number of motions in limine to be addressed, your Honor.

THE COURT: All right.

MR. NEAL: May Ms. Ohler sit while we discuss that?

THE COURT: Certainly, absolutely. I have reviewed the [3] motions in limine. First motion in limine filed by the defense is to prevent the testimony of agents regarding drug courier profile. Anything further on that, Mr. Neal?

MR. NEAL: No, your Honor. I sort of incorporated that motion into motion in limine No. 2 made by the Government, which was to admit expert testimony regarding the structure of drug organizations. And I'd just ask that we make the appropriate objections as the testimony is elicited and rule on those, ask that your Honor rule on those as the evidence comes out.

I think that we're probably all pretty much in agreement on what constitutes a drug courier profile, and I just think it's an issue that we should deal with when it comes up in trial.

MR. KELLY: Your Honor, as the Government's papers indicate, we don't have any intention of introducing drug courier profile as the Ninth Circuit typically defines it. However, I think there is a larger issue here with respect to the drug smuggling operation and the so-called *Cordoba* testimony. It would be the Government's position that the Government should be permitted to admit that kind of evidence, particularly in a case like this. I'm sure Mr. Neal, as his papers indicate, would oppose that.

THE COURT: Mr. Neal?

MR. NEAL: I do, your Honor. The testimony the [4] Government is referring to is proposed expert testimony that drugs smugglers never entrust a load to an

unknowing driver; in other words, they want to have an expert testify, a law enforcement agent testify that people driving loads across the border always know what they're transporting. And that testimony was permitted in the *Cordoba* case, but I believe that this case is easily distinguished from *Cordoba*, your Honor. *Cordoba* involves over 300 kilograms of cocaine, and this case involves 81 pounds of marijuana that I believe the Government has stated in their papers would have a wholesale value of about $41,000. Now, over 300 kilograms of cocaine, or about 650 or 700 pounds, is worth millions and millions of dollars, and my understanding of the Ninth Circuit opinion in *Cordoba* is that the testimony was found to be permissible on the theory that as valuable as this load was, it was probative of knowledge to allow – and therefore that gave the foundation for the expert to be able to testify that no one would ever entrust something this valuable to a person who didn't know what was in the car. Well, I just think we have apples and oranges here because we're dealing with a much, much lower net worth amount given that this is an 81-pound marijuana case as compared to a 300-kilogram cocaine case.

I also think under Federal Rule of Evidence 704 (b) that this would be impermissible testimony that would violate Ms. Ohler's due process rights. Essentially it would be [5] allowing expert testimony on the requisite mental state, which is the only issue in dispute for purposes of trial. I think basically it would be allowing the Government to introduce expert testimony that this substance was tested and it is in fact marijuana, that an agent will testify that in my experience 81 pounds is an amount intended for distribution; and if the Government is able

to introduce this line of testimony, there will be expert opinion offered that the person driving always knows what's in the car. That's it. It's essentially a directed verdict of guilty I believe by way of expert testimony. And I think because this case is distinguishable from *Cordoba* and because of Rule 704 (b) that the Court should not allow this line of testimony.

THE COURT: If the testimony were in fact that the courier always knows that there's drugs in existence, then the reasonable inference would be that this particular defendant, that is, any particular individual would have to have knowledge. If the testimony is that generally this is the circumstance, then in effect is it still a statement that your client does in fact have the requisite mental state, as you point out, in other words, if it's qualified, if there's a reference that generally these individuals know, couriers know –

MR. NEAL: Well, I don't think that – if that is the extent of the testimony permitted, I don't think that would be [6] invading the province of the jury on the question of Ms. Ohler's mental state. So I don't think by virtue of that testimony the jury would have to infer that she must have known also. But if we're just speaking in general terms, then I think it becomes a question of relevance.

I of course would agree with the Court that I would prefer that the Government be limited to eliciting testimony that generally couriers know, but I think that when we get to general terms, it's in the abstract, it's not connected to this case specifically.

THE COURT: In essence isn't that always what profile evidence is; it's in evidence in general terms?

MR. NEAL: Yes.

THE COURT: Let's see what Mr. Kelly's position is on that.

MR. KELLY: Your Honor, literally, I suppose figuratively, the question here is the weight to be attributed to the testimony. Mr. Neal is a fine lawyer, and he has –

THE COURT: What would the testimony be?

MR. KELLY: – ample opportunity –

THE COURT: What would the testimony be?

MR. KELLY: Well, given the Court's expressed perhaps inclination, of course it would be the Government's position that *Cordoba*, straight as it was decided, ought to be introduced. We could certainly qualify the testimony in more [7] generic, general terms such that any concerns about invading the province of the jury would be alleviated. But this whole issue of it was cocaine or heroin or 300 kilograms or 80 pounds of marijuana, that I believe is clouding the issue somewhat. It is the jury – the jury's decision how much weight to attribute to the fact that it was marijuana, that it had a $78,000 street value or $41,000 wholesale value. They're capable and competent of making that decision, and the Government would therefore seek to introduce and believes it's actually very important to the Government's case.

This is a case, your Honor, where the defendant invoked; it's not the Government – the Government is not

seeking to gild the lily or there's not a surfeit of evidence in this case, your Honor.

THE COURT: All right. I don't know that there's a problem at this point, Mr. Neal, given Mr. Kelly's position as to how the evidence will come out. I think that perhaps the better course would be to have you reserve your objection to any individual question, and we'll see how the question is asked and what the proffer is.

MR. NEAL: Well, your Honor, that concerns me – because I think if the Government is allowed to ask an agent do couriers always know what they're transporting and the agent is allowed to state yes, they do, it in my mind would not be a situation where the jury is left to decide how much weight to [8] give that evidence. They're not being given any wiggle room or told to decide to use your own discretion how much weight and emphasis to give to this ambiguous testimony; they're being told that one hundred percent of the time couriers know. And I, first of all, don't believe that to be the truth; but secondly, this case is so distinguishable, I'm not comfortable getting to a point in trial where the Government asks that question and then I have to object because it would be trying to unring a bell that would be devastating to our defense.

THE COURT: I think under the facts of this case, it would not behoove any agent to take the stand and testify that in 100 percent of cases couriers know of the existence of contraband of drugs. That is tantamount to the agent saying this individual defendant or any individual defendant in fact knew, which I believe does

unfairly invade the province of the jury in this kind of a case.

I think it's another thing, however, for the profile testimony to come in, Mr. Kelly, and I thought that is what you indicated you would do in this case, that's where you would go.

MR. KELLY: And my comment's just made, your Honor, with –

THE COURT: Yes.

MR. KELLY: Certainly, your Honor, we would abide by the Court's decision in this case, and no testimony will be elicited to the effect that couriers know 100 percent of the [9] time or absolutely must know.

THE COURT: Or that couriers – well, you've said it yourself better than I could paraphrase your thoughts at this time. All right, gentleman. That's fine. You'll reserve any objection as well, Mr. Neal?

MR. NEAL: Yes, your Honor. There's one other issue with respect to expert testimony that relates to whether the Government should be permitted to introduce evidence of simply the wholesale value of the marijuana or also the retail value of the marijuana.

I requested in my papers that the Government be limited to introducing evidence of the wholesale value for basically two reasons, and that is that I believe that it will be the Government's theory that Ms. Ohler was knowingly crossing this load of marijuana with the intent to deliver the load to another person/party. I don't believe that there's any evidence or any indication that the Government is going to try to suggest that Ms. Ohler was

actually going to sell this marijuana on the street, and because her participation is alleged to have been limited to driving this across the border and giving it to another person, and that leg of the transaction I believe only implicates the wholesale value because the retail value does not become important or it doesn't come to fruition until it's in the hands of the actual dealer, your Honor.

The cases that the Government cited basically are I [10] believe heroin and methamphetamine cases where there was expert testimony allowed concerning the cutting of the drugs, the quality of the drugs; and how that affects street value. I understand that the value of the load is something that they should be able to argue knowledge, you can infer knowledge from that value, but I think that should be limited to wholesale value.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, I think that the case law – once again, Mr. Neal tries to draw a distinction between heroin and cocaine and marijuana. The fact is they are all controlled substances. This is critical. The retail value, as the case law makes clear, ought to be admitted. It is critical to the Government's case to prove knowledge. With that the Government will submit.

THE COURT: All right. Defendant's motion in limine to prevent testimony of the retail value of the drugs in question is denied. Mr. Neal?

MR. NEAL: Your Honor, we have entered into a stipulation that the substance involved is in fact marijuana, we've stipulated to the chain of custody, and we

would also be amenable to a stipulation that this was an amount intended for distribution.

I think under the Supreme Court case of *Old Chief* from last year where we are agreeing to stipulate to an element, the [11] Government basically has to accept that. And I understand that the Court has ruled they can introduce evidence of retail value, but any protracted testimony concerning, you know, this is 81 pounds, does anyone smoke 81 pounds themselves, is it possible this could have been personal use is unnecessary given our willingness to stipulate.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, although I appreciate Mr. Neal's offer to stipulate, the Government respectfully declines to accept it. It is truly the – one of the linchpins of the Government's case. Again, this is not a case in which there is a surfeit of evidence to prove knowledge. The Government has to go on the value, what is it exactly that the defendant was carrying, what is it exactly that she was entrusted with, and I believe the Government has the right to do that, your Honor.

THE COURT: So this is a variation on the earlier motion, Mr. Neal, to prevent or preclude evidence of the retail value given the stipulations you're willing to enter into?

MR. NEAL: Sort of. I understand you're allowing the retail value to come in. I'm just saying that even though the retail value comes in, any lengthy questioning about how much could one person have as personal use and is there any way that this 41 pounds could have been

personal use is unnecessary because we will stipulate this was a distributable amount.

THE COURT: I would suggest you make your position [12] clearly known at the earliest possible time with the jury. It tends to diffuse the issue; in a sense you're allowing or you're asking for some kind of limiting instruction from the Court that this evidence may be utilized only to a certain degree or mentioned a certain number of times and thereafter it becomes argumentative, and/or prejudicial. I'm going to not make any further rulings in this regard. The motion has been denied with respect to the evidence coming in, and we'll just see how that plays out, Mr. Neal, given the stipulations you're entering into.

Anything further that needs to be addressed in motions in limine?

MR. KELLY: I believe a few matters, your Honor.

THE COURT: Okay.

MR. KELLY: Your Honor, the Government has sought to introduce the defendant's prior conviction – arrest and conviction for methamphetamine possession; the Government would seek to introduce that under 404 (b). And under the case law cited in the Government's papers, I have just prior to coming to court, your Honor, photocopied a case, *United States v. Santa Cruz*, 48 F3d. 1118, which is cited in the Government's papers. But in that case, the defendant was convicted of possession of one gram of cocaine, and the court of appeals ruled that it was not error to admit that conviction in a subsequent

trial for trafficking. Specifically, the Court said Santa Cruz's prior [13] act made his knowledge of the charged offense more probable. It occurred just 12 weeks earlier. It served to rebut his argument that he had not knowingly participated in the drug transaction and that his possession of cocaine was accidental.

The Government would expect that that will be in some variation the defendant's case – the defendant's argument that she did not know about it, that it was accidental. The Government would therefore seek to introduce it under 404 (b).

THE COURT: Mr. Neal?

MR. NEAL: Your Honor, I oppose the motion that this evidence comes in under 404 (b). I think in order for the Government to be able to use 404 (b) to get this in, the Government would have to show that Ms. Ohler has a methamphetamine habit that is sufficiently expensive that that created a motive for her to drive this load across the border.

This conviction for possession under 11377 (a) of the Health and Safety Code is from five years ago. Ms. Ohler has been out on bond in this case. She's been drug testing with Pretrial Services over the past six months three times per week. She did have two tests that were positive about four months ago I believe downstairs in front of Judge Aaron, but she has tested clean well in excess of 50 times.

This would be very powerful evidence if the Government was allowed to suggest that this woman has a habit

that would require her or give her a motive to go out and transport [14] narcotics.

I cited a case from the Fifth Circuit, *United States v. McDonald*, I think that is directly on point, your Honor; it's on pages 13 and 14 of my motions. This was a case where Mr. McDonald was arrested at the border in El Paso with 70 pounds of marijuana in the gas tank and back seat of his car. At trial the prosecutor was permitted to cross-examine the defendant about his past drug use. So this isn't even a case where it came in presumably under 404 (b) in the Government's case in chief; it came in for impeachment purposes during the defense case. The court of appeals held that it is a very large leap in rational inferences to conclude that because they used methamphetamine in the past, that therefore makes it more likely that they knew they were transporting marijuana on the date in question, which in this case was July 29, 1997. So I just don't think there's a sufficient nexus between any evidence of drug usage and the allegations in the case.

If she had a multitude of arrests for being under the influence and convictions and in this case had demonstrated that she has a methamphetamine habit that essentially makes her a junkie, maybe we're talking motive, but I think the Government falls far short of showing that in this case.

MR. KELLY: Your Honor, to be clear, the Government is offering the 404 (b) evidence under two theories, only one of which is motive. And even if the Government were to accept the [15] fact that addiction is not necessarily demonstrated as a result of one conviction

and that she has tested cleanly over 50 times, I should alert the Court to the fact that the 50 clean tests occurred post-arrest – not obviously indicative of her state either during or prior to her arrest. But the Government is offering it both under motive.

This is a person who has by her own biographical information, the booking information, she is a self-employed flower arranger who is receiving California benefits, welfare benefits. I think it's clear in this kind of a circumstance that if she has a – an addiction and she needs the money – this is a person who does not have a great deal of money, she needs to make it. Now, that's only one of the theories. The second theory and the one to which *Santa Cruz* speaks very directly and clearly is that it is evidence of knowledge. Once again, irrespective of the money aspect of it, irrespective of the motive, it goes to knowledge, and the jury ought to hear it and the jury can assign whenever weight it chooses to that.

THE COURT: *Santa Cruz* was a case where there was a real temporal relationship between the conviction for drug possession or drug use and the charge of drug trafficking. It was a very short interim of time there. Here we have a five-year period of time, and I have concern as to whether or not a conviction for mere drug possession is close enough in time in this case to justify the argument you're making on the [16] probative value of the evidence. So can you be a little more responsive to that particular concern?

MR. KELLY: Your Honor, understanding the Court's concern, and obviously the Court knows the *Santa Cruz* case well – it was a temporally – it was a

conviction of the subsequent trial far closer in time. The test – the case law under 404 (b), however, the Government would be well within the time period during which other 404 (b) evidence has been ruled admissible by the Ninth Circuit.

THE COURT: That may be true for another ground or another rationale for probative value, but here the rationale is that if one is a drug user or has ever been convicted of a drug use offense within five years of a trafficking charge, then one – or the trier of fact should draw the inference that one is more inclined to engage in drug trafficking if one has in effect ever sustained a conviction for a personal use offense.

MR. KELLY: The difference in this case, your Honor, is that, as the Government has pointed out, at best she is an occasionally self-employed flower arranger who is on benefits who also tested dirty twice while this case was pending.

THE COURT: If you're talking now about economic motive at or about the time of the alleged conduct in this case, then don't we have to look at this particular point in time rather than going back five years and determining what her circumstances were five years ago or judging what she did today [17] by an act of personal use that she might have engaged in five years ago?

MR. KELLY: That's a good point, your Honor. I sort of fell into the same confusion of the issues. The Court is absolutely right, one is motive, one's knowledge. It would be the Government's position that the knowledge component stands in its own right, and it's admissible simply as going to make her knowledge more

probable of a drug trafficking conviction even five years later.

Now, we would also argue that under motive there is a drug problem here, there is financial distress here, and the defendant – it makes it more likely that the defendant transported drugs in order to support that drug problem.

THE COURT: If that's your argument as to economic necessity or whatever, if you can establish that through competent evidence, then you're free to establish that as it relates to motive, but attempting to use a five-year-old conviction for personal use as constructive knowledge that on a particular occasion the defendant knowingly transported drugs or contraband of a different type entirely I think is a stretch. It's obviously prejudicial. The question is whether or not the probative value on that evidence is – on the issue of knowledge is outweighed by the prejudicial effect. I think given the circumstances of the prior conviction, it would be, and I will grant the motion in limine with respect to that prior [18] conviction.

MR. NEAL: Thank you, your Honor.

MR. KELLY: Your Honor, do I understand the Court to be saying that if the Government can prove financial distress in some way that this evidence can come in, that is, by proof of the receipt of benefits, the proof of occasional or lack of employment? I just want to be clear as to the Court's ruling.

THE COURT: If your position is that current financial or at least financial status at the time of the alleged conduct is relevant as it provides a motive, I think

if you can establish that through competent evidence that is not unduly prejudicial, you may do so. It's difficult for the Court to prejudge every conceivable bit of evidence you may want to introduce in that regard.

Once again, if we're looking at individual pieces of evidence, then I have to determine whether or not any prejudicial value or prejudicial effect of that particular evidence is going to outweigh any probative value.

MR. KELLY: To be specific, your Honor, the Government as indicated in another one of its motions in limine it would seek to introduce evidence of the two dirty drug tests; that is evidence of a continuing drug problem and addiction. I know Mr. Neal has opposed those motions, but specifically the Government would seek to introduce that, once again as evidence of motive.

THE COURT: Mr. Neal?

[19] MR. NEAL: Again, your Honor, I just think –

THE COURT: As to motive, Mr. Neal.

MR. NEAL: I just think this is – there's an insufficient nexus, your Honor, to establish that Ms. Ohler has the type of drug addiction that is so expensive that it creates a motive for her to transport drugs across the border. There's no foundation that exists to show that she uses so many times per week, it costs X amount of dollars, and that she has no other way of paying that. There's just no nexus between the two positive tests and a motive to drive a load across the border. I mean what about the 50 or 60 clean tests? Maybe I should be able –

THE COURT: I'm sure that Mr. Kelly would not in any way oppose your effort to introduce evidence of 50 or 60 incidents of clean testing if in fact he were to proffer the dirty testing. Mr. Kelly?

MR. KELLY: That's correct, your Honor.

MR. NEAL: I wouldn't want to make that trade-off, your Honor. I think on 403 grounds that to allow the jury to hear that she has had two positive tests during the seven-month period this case has been pending would basically create the inference that she's a bad person, it would make the jury dislike her, and I think that that would certainly hinder her ability to get a fair trial.

The real question is admissibility here, and if the [20] theory of admissibility is motive, I think there's an insufficient foundation based on two tests to infer that she's got a motive to transport drugs. There has been no showing that she has this expensive habit that would give rise to a motive.

THE COURT: Is it your position, Mr. Kelly, that evidence that Ms. Ohler on two separate occasions during a seven-month period tested positive for – what kind of drug?

MR. KELLY: Methamphetamine.

THE COURT: – methamphetamine, she tested positive for methamphetamine that that evidence is probative on the issue of motive?

MR. KELLY: That's correct, your Honor. Simply put, once again given the defendant's situation, she is self-employed, perhaps unemployed, receiving benefits,

and if she has a drug addiction, I think that speaks very clearly to motive; she needs money to support the habit.

THE COURT: All right. If that is the ground upon which you seek to introduce two tests out of a total of 60 or 70 tests over a seven-month period of time, I will grant the motion.

Once again, I think that the fact that the defendant used methamphetamine on two occasions, has tested positively on two occasions, does not establish motive. In any event, any prejudicial effect of the testing on those two occasions is in my view undue prejudice and outweighs the probative value of the [21] testing on those two specific occasions as it relates to motive. You're just proffering motive at this point; I don't see the connection.

MR. NEAL: The Government's motion to admit this 404 (b) has been denied as to motive and as to knowledge?

THE COURT: If that is the further – well, the ground was motive, Mr. Neal; I've denied it as to motive. That was the entire rationale for this argument that Mr. Kelly just made, motive, and that's where the test results are unduly prejudicial. Any probative value relating to motive is outweighed by the undue prejudice.

MR. NEAL: Thank you, your Honor. Your Honor, with regard to the discussion concerning financial status and whether her economic circumstances would create a motive to drive drugs across the border, this is not a motion that the Government made in its in-limine papers, so I did not brief this issue. However, it is my understanding that there is case law from the Ninth

Circuit that says that evidence that a person is poor basically cannot be used as evidence of criminal motive for 403 – on 403 grounds. I believe the case states that if the Government is allowed to introduce evidence that a person is poor and therefore they've got the motive to commit crimes, that that type of evidence is so sweeping and it would encompass so many people that, you know, truly may or may not have a motive to commit crimes that it's unduly prejudicial. And this I [22] believe relates to the Government's motion to admit the routine booking information, which I'm not opposing that in principle, but I don't believe the Government should be able to admit any evidence of welfare status. I think if taxpaying jurors hear that this is a woman who is on AFDC or collecting food stamps that the prejudicial value from that will be so great that it would be impossible for her to get a fair trial.

THE COURT: Well, I'd wait to see your case. You indicate there's a Ninth Circuit case on that issue, and I'll defer any ruling on that, giving you a chance to submit your case unless, Mr. Kelly, you want to respond at this point.

MR. KELLY: Well, not having seen the case, your Honor, obviously I can't respond specifically except to say that I believe it would mislead the jury to exclude that kind of information. The jury has a right to know that this is a woman who may not be employed and who receives welfare benefits.

THE COURT: All right. We'll take a look at the case then, Mr. Neal, when you have it.

MR. NEAL: We're starting Wednesday?

THE COURT: Yes.

MR. NEAL: If I bring it Wednesday morning, you can address that?

THE COURT: I would suggest you file and serve it before then. I assume it's at your fingertips or readily accessible. If you can file and serve it tomorrow, I'll have a [23] better opportunity to look at it.

MR. NEAL: I'll do that, your Honor.

THE COURT: Okay.

MR. NEAL: Your Honor, there was one other indication in the Government's papers regarding using statements that Ms. Ohler made to her Pretrial Services officer for impeachment purposes. I have had a discussion with Mr. Kelly about Title 18 U.S. Code Section 3153, specifically Section (c)(1). It's my belief that this statute precludes the Government from using any statements made to Pretrial for purposes of trial. And I don't know if this is an issue that needs to be dealt with on the record or if Mr. Kelly concedes that.

MR. KELLY: Your Honor, that might in fact be the case. Mr. Neal certainly points to the relevant statute. The Government's position in this case is that we wouldn't at this point seek to call as a witness the Pretrial Services officer, who would then testify as to conversations which, arguably, under the statute, might be confidential. However, the facts of this OSC include an admission by the defendant and letters submitted by the Pretrial Services officer in which he indicates that the defendant has denied prior drug use. My understanding

is that those letters are made a part of the court record and therefore do not fall within the proscription of 3153.

MR. NEAL: Your Honor, may I pass out a copy of the relevant statute?

[24] THE COURT: Have you two had a chance to confer on this question?

MR. KELLY: A little bit, your Honor.

MR. NEAL: Your Honor, I believe that if we look to Section (c)(1), it states "Information obtained in the course of performing Pretrial Services functions." I think that's all encompassing, so whether something later becomes a part of the court file, the question is what is its origin; its origin was it was something that was developed in the course of performing Pretrial Services functions.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, having spoken with the Pretrial Services officer just this morning on the statutory proscription, he is reluctant to take the stand because of this very statute. He expressed to me his belief that we may fall without that proscription insofar as the letter that she submitted to the Court and became part of the permanent file indicates that the defendant initially denied a history of drug use.

THE COURT: Isn't that information obtained in the course of performing Pretrial Services functions in this case?

MR. KELLY: It may be, your Honor, but the difference here is that it has been published in a public

manner. And once again, it wouldn't be a question of the Government calling the Pretrial Services officer, it is simply making reference to the [25] public record and specific – and the specific content of that.

THE COURT: What is the public record?

THE CLERK: Those aren't put in the file; the letters to the judges aren't put in the file, only the OSC.

MR. KELLY: Your Honor, on August 12 Pretrial Services Officer Kathy Larson addressed Judge Aaron – in the third paragraph.

THE COURT: Is that a public record though?

MR. KELLY: I believe it is, your Honor.

THE COURT: What makes it a public record? How does it get imposed to the public?

MR. KELLY: Because it becomes part of the permanent file.

THE COURT: Well, are you sure about that?

MR. KELLY: I'm not sure about it, your Honor.

THE COURT: I think you better do some research on that. I think that that kind of a document falls within the general proscription here in Section (c)(1), does not meet the exception of Section (c)(2). But take a further look at it if you would.

MR. KELLY: I will, your Honor. Thank you.

THE COURT: All right.

MR. NEAL: Just two additional motions, your Honor. There's a motion pending for admission of this

1993 conviction for 11377 (a) under 609, and it was my understanding at the time [26] the papers were filed, I don't think either party had the court records from that case; but it was my understanding that that Health and Safety Code section is a wobbler, and I had objected to the admission under 609 at least until the threshold requirements of 609 were fulfilled, in other words, that it was a conviction punishable by a term of imprisonment exceeding one year.

I now concede that Ms. Ohler pled to the felony portion of that penal code section. However, I would object to the use of this prior conviction under 609. My objection is based on Rule 403. And again, I don't want to belabor the point, but I just believe that if the jury hears that she has a prior conviction for possession of a personal-use quantity of methamphetamine, the effect of that will be that many jurors will instantly be so prejudiced that they will reject anything that Ms. Ohler would have to say on any other matter in the case, and I think that it would deprive her of a fair trial. I don't think it's probative. The issue here is knowledge. There's no indication that using methamphetamine five years ago makes it more likely that she knew there was marijuana jammed in the side panels of this van on July 29, 1997, so I think the probative value is very minimal, and I think the prejudice could be great.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, I believe this falls square – [27] squarely within 609. It is a felony conviction. If the defendant chooses to take the stand, I think she ought to be – the Government ought to be permitted

to impeach the defendant with a prior conviction. This falls squarely within Rule 609.

THE COURT: And you are arguing what, that it's an imperative that the evidence come in or it's within judicial discretion and that judicial discretion should be exercised in such a way that it be kept out? What's your argument in that regard?

MR. KELLY: Your Honor, it's a judicial discretion matter. It is not – it is not an imperative –

THE COURT: All right.

MR. KELLY: – based on –

THE COURT: Tell me how I should exercise my discretion and why.

MR. KELLY: Your Honor, once again, in order for the jury to have a complete picture of what went on here, particularly in light of the Court's granting of the defendant's motion in limine to exclude as 404 (b) evidence, I think there's a great danger here of misleading the jury. And the jury's entitled to have the credibility of the witness tested and impeached, and that impeachment – one of the standard impeachment techniques or tools is a prior felony conviction, prior felony conviction for drugs.

It would be the Government's position that this is [28] something that's important and critical to the Government's case if the defendant chooses to take the stand we would be deprived of.

THE COURT: I know your position is that it's critical. I'm asking you to explain how this Court should

analyze such issues as remoteness in time, the similarity of the prior conviction to the present charge, questions dealing with issues of moral turpitude, the nature of the act itself, its ability to shed evidence on a defendant's characteristics of truth, veracity, honesty. Those are the kinds of things I'm looking to hear.

MR. KELLY: Your Honor, Rule 609 does not require the same kind of four-part 404 (b) –

THE COURT: Not asking for a *Castro* kind of four-part analysis, but if you're asking me to exercise discretion, those are the kinds of things that should be looked at. I realize we don't have a *People v. Castro* imperative here, but –

MR. KELLY: Your Honor, the conviction obviously falls within the ten-year time frame within which – to which 609 speaks; it's five years out.

In terms of the witness's capacity for truth telling, I think it's very probative of truth telling, particularly, frankly, in light of the subsequent dirty tests, the subsequent urinalysis tests that the Court has denied the Government at least in its case in chief.

[29] THE COURT: How does it relate to truth telling?

MR. KELLY: Because frankly I believe that there is case law, although I don't believe that Mr. Kaplan has cited it, that truthfulness can be impeached by prior drug use, that a drug user's capacity for truthfulness may be impeached –

MR. NEAL: Your Honor, I request –

THE COURT: Hold on, Mr. Neal.

MR. KELLY: – by drug use. I'm not certain of that, frankly, your Honor, but this is – obviously we're dealing with a possession charge as opposed to an importation charge or even, frankly, a possession with intent to distribute charge. I don't believe that that prior conviction was a possession with intent to distribute; I believe it was simply a possession charge. However, it does involve narcotics, it involves controlled substances. Yes, it's five years out, but five years out is not too remote in time statutorily, and, in fact, in this case there's a history, there's a possibility at least of a continuing drug problem.

My belief is that if the Court were to exercise its discretion and permit it at least on cross-examination for impeachment that the jury would have a full and accurate view of the circumstances of this alleged offense, and to the extent that Mr. Neal would like to address those points, he can do so on redirect.

THE COURT: Mr. Neal?

[30] MR. NEAL: Your Honor, my understanding of the law with regard to whether a drug usage conviction is held to be probative of truthfulness is the exact opposite of Mr. Kelly's understanding, and I would just request that this is something that we also supplement our briefing on perhaps tomorrow.

The case law under 609 provides that a prior conviction can be admitted if the punishment was – was punishable by in excess of one year's imprisonment. The second prong of that is if it involved dishonesty or a false statement. This is really what I'm referring to. I believe there

are cases that say that drug usage is not probative of dishonesty or veracity.

THE COURT: Federal cases or state cases?

MR. NEAL: Federal cases, Ninth Circuit case law, I believe, your Honor.

MR. KELLY: That may well be, your Honor, but Mr. Neal is looking at 609 (a)(2), which refers to any crime regardless of whether it's a felony or misdemeanor may be admitted at the discretion of the Court if it involves the kind of dishonesty the Government would be seeking to introduce under 609 (a)(1).

THE COURT: I think Mr. Kelly is making a direct distinction under 609, Mr. Neal.

MR. NEAL: Correct, your Honor, but Mr. Kelly was saying that your Honor's questions regarding remoteness in time and misleading the jury and prejudice, that those were not things that 609 requires. I disagree because 609 (a)(1) [31] specifically incorporates Rule 403, and 403 requires that your Honor in exercising the Court's discretion evaluate the admissibility of the evidence based on those specific factors.

THE COURT: I'll certainly give it some additional thought. You indicate you may have a case or two that you want to bring to my attention, Mr. Neal, on the connection between a drug possession conviction and one's propensity to tell the truth.

Are you informing the Court that if this – well, that your client will in fact testify if in fact your motion here is granted?

MR. NEAL: If my motion is granted?

THE COURT: In other words, if this prior conviction – I don't know whether it's the request of the Government for an order allowing it or – I think that's probably the way it is at this point – I don't think you've addressed a motion in limine against it, Mr. Neal.

In any event, are you advising the Court that your client will in fact testify if this prior conviction is ruled inadmissible, and she will not testify if the Court rules that she may be impeached with this prior conviction?

MR. NEAL: I think that's a pretty fair assessment, your Honor. Of course, I would like to hear the presentation of the Government's case, but I believe that what your Honor stated is pretty much right on.

[32] THE COURT: Okay. I'll be happy to take a look at that additional case you mention, Mr. Neal.

MR. NEAL: Thank you, your Honor.

THE COURT: And I'll defer ruling on that question.

MR. NEAL: I think the only other motion that's in dispute is the Government's motion in limine to demeanor evidence. And I filed an opposition to this motion, your Honor, because there was some language in the Government's motion relating to their intent to have the agents testify that – I'm quoting here from page 16 of the Government's motion – Government agents had the opportunity to watch defendant as they asked her questions and informed her of facts relating to the offenses charged. And I filed an opposition citing *Doyle v. Ohio*

and of course asking that your Honor preclude the Government from eliciting any testimony relating to any post-Miranda silence. If Ms. Ohler sort of just sat there or didn't come out with a denial, I don't think that's permissible evidence; I think it could violate her due process rights. I think it's a Fifth Amendment violation under the Supreme Court rule of *Doyle*. I make that in-limine motion as well.

MR. KELLY: Your Honor, the Government has no intention of offering any evidence with respect to the defendant's demeanor after advisement of her Miranda rights and the invocation thereof.

THE COURT: All right.

[33] MR. NEAL: Thank you.

THE COURT: Mr. Neal, anything further?

MR. NEAL: Well, there would be attorney voir dire, your Honor.

THE COURT: Yes.

MR. NEAL: How long will that be, your Honor?

THE COURT: How long would you like?

MR. NEAL: Fifteen minutes.

THE COURT: All right. I think that's reasonable.

MR. NEAL: Thank you.

MR. KELLY: Your Honor, could I take up one last issue with the Court? For purposes of clarifying the

Government's leeway with respect to the OSC, apart from the letters and the confidentiality issue, if the defendant takes the stand, is it permissible – is the Court permitting the Government to impeach on the basis of the two failed urinalyses? That's a related but separate question from the statements made to Pretrial Services Officer Larson and incorporated in the letter.

THE COURT: This issue of drug use – now we're revisiting what's already been decided; I think you're asking for clarification, however.

MR. KELLY: I am, your Honor.

THE COURT: I think this issue of drug use was predicated upon the rationale that somehow it proves motive. I think that's where you were going with this initially. That [34] rationale applied to the 404 (b) attempt to get the five-year-old conviction in, and it was also an underlying basis for your effort apparently to make some mention of the two dirty tests.

My earlier ruling was predicated upon your proffer that this evidence was related to motive, and in my view if that's the purpose of that evidence, then any probative value as it relates to motive is outweighed by the undue prejudice to the defendant of those test results coming in.

MR. KELLY: Simply to take it one step beyond, your Honor, with respect to my 404 (b) analysis, I was predicating it on motive. However, in the impeachment context, I would be seeking to introduce it simply as to the truthfulness. Now, I understand that that might be subsumed within the Court's concern, expressed concern with regard to the conviction, but I would be seeking

simply to cross-examine the witness and to allay issues of truthfulness.

THE COURT: On the fact she's tested dirty?

MR. KELLY: That's correct.

THE COURT: Your rationale is that people who use drugs, whether they test dirty once or twice over a significant period of time or whether they're addicts, are less likely to tell the truth than people who don't use drugs. Is that your position?

MR. KELLY: I suppose in a general way that is my [35] position, your Honor, except what I prefer to do is simply reserve that issue in a sense that the Court has precluded the Government from offering it strictly on the issue of motive but if it becomes relevant in another context. And the Government can revisit that issue with the Court.

THE COURT: You can always revisit the issue, Mr. Kelly. No ruling I make is with prejudice; I always keep an open mind. If you're attempting to justify evidence of dirty drug testing on the rationale that it has impeachment value because someone who uses drugs on one or more occasions is less likely to tell the truth and you have authority for that proposition, case law or authority, I would be happy to read it. I think Mr. Neal indicated he had a case he wanted to bring to my attention in that regard.

MR. NEAL: Yes, your Honor, but, your Honor, with regard to cross-examination of the defendant, it is my understanding that would only become admissible for impeachment purposes if we somehow open the door.

In other words, Mr. Kelly could not just stand up out of the blue and say isn't it possible you tested positive twice –

THE COURT: That's true. That's correct.

MR. NEAL: – as impeachment.

THE COURT: For example, if your client testified and she volunteered beyond the scope of your question and all of a sudden made a statement that she would never transport drugs, [36] and as a matter of fact, she's never even used drugs, that would certainly open up the issue on the question of impeachment. I think under that kind of scenario, that kind of evidence would clearly be admissible.

MR. NEAL: I'll try to make sure that doesn't happen.

THE COURT: I'm sure you will. I'll try to take a look at any additional cases you have that you'd like to submit tomorrow, and, Mr. Kelly, if you want to do a little research on this point – on the two points we've discussed, I'll be happy to read anything you've submitted tomorrow.

MR. KELLY: Thank you, your Honor.

THE COURT: Anything further then?

MR. NEAL: No, your Honor.

THE COURT: Okay. We'll see you Wednesday at nine o'clock.

MR. KELLY: Thank you, your Honor. (The proceedings were concluded.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

SUPPLEMENTAL IN LIMINE BRIEFING

TO: ALAN D. BERSIN, UNITED STATES ATTORNEY, AND KEVIN J. KELLY, ASSISTANT UNITED STATES ATTORNEY:

I.

THE GOVERNMENT SHOULD BE PRECLUDED FROM INTRODUCTION EVIDENCE OF POVERTY OR WELFARE STATUS TO ESTABLISH CRIMINAL MOTIVE

The Ninth Circuit has examined the use of an individual's financial condition to prove motive. *United States v. Jackson*, 882 F.2d 1444 (9th Cir. 1989) (a copy of this opinion is attached as Exhibit A). The *Jackson* Court distinguished between two lines of cases that discuss evidence of financial condition to prove motive: general evidence of financial hardship, and specific evidence of financial hardship. *Id.* at 1450.

In its discussion, the *Jackson* Court noted that the former line of cases resists "linking poverty with motivations to commit crimes." *Id.* at 1449. Thus, admission of general evidence of a defendant's poverty is an abuse of discretion because "juries must not be permitted to assume that just because the defendant is poor he is likely to commit a crime to obtain money." *Id.* (discussing cases).

The *Jackson* Court distinguished cases that abhor general evidence of financial condition from the latter line of cases that permits introduction of specific evidence of financial condition: "courts admitting evidence of financial motive have been confronted with more than the mere fact that the defendant is poor." *Id.* As examples, the *Jackson* Court cited cases where a bank robber's heroin habit provided motive for robbery, or evidence that a defendant had amassed large debts as probative of motive to commit a crime for financial gain. *Id.* (discussing cases). In the latter line of cases, a **specific link** exists to connect the evidence of poverty with the motivation of the offense. *Id.*

In *Jackson*, the district court permitted testimony that the defendant was short of funds and experiencing financial difficulty. *Id.* Although inclosing it "mentioned" the testimony about financial hardship, the government "did not argue that Jackson was poor and therefore he participated in this scheme." *Id.* at 1450. Therefore, the *Jackson* Court, after deciding the evidence before it fell somewhere between the general and the specific, held that the admission of evidence of financial hardship in that case was not error. *Id.*

Ms. Ohler's case differs from *Jackson*. The government has not offered any specific link between Ms. Ohler's unemployed/welfare status and motive to commit the instant offense. Accordingly, the evidence that the government seeks to introduce is merely **general evidence** of Ms. Ohler's indigency as motive.

Poverty alone does not indicate a motive to commit a crime. *Id.* As the *Jackson* case makes clear, there must be

evidence "imminent financial burden" or pressure to overcome the general resistance to linking poverty with motive to commit crimes. *Id.* at 1449. ("Those courts admitting evidence of financial motive have been confronted with more than the mere fact that the defendant is poor").[1] No specific evidence exists in this case indicating that Ms. Ohler was in debt or in need of an infusion of cash to overcome an imminent financial burden. At best, the evidence merely establishes that she is poor. Accordingly, the evidence proffered by the government is simply generalized evidence of poverty status that is inadmissible.

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[1] Justice Reinhardt, (dissenting):

> Nevertheless, even if there is a link between poverty and crime, we have consistently excluded generalized evidence of poverty on the ground that this evidence wrongly casts suspicion on the disadvantaged and affords them unequal treatment with members of more privileged classes;
>
> I suspect that poor people are already sufficiently disadvantaged by our criminal justice system that we do not need to invite images of steretype and prejudice into the jury box.
>
> When the prosecution has attempted to introduce generalized evidence of monetary need that is shared by a great number of people, the federal appellate courts have been virtually unanimous in their condemnation of that evidence.

Jackson at 1452.

II.

THE GOVERNMENT SHOULD BE PRECLUDED FROM USING A 1993 POSSESSION OF METHAMPHETAMINE CONVICTION TO IMPEACH MS. OHLER'S TESTIMONY

In deciding whether to allow the government to impeach Ms. Ohler's testimony pursuant to federal Rule of Evidence 609(a)(1) with her sole criminal conviction, a 1993 Possession of Methamphetamine for Personal Use Charge, this Court inquired of the government as to how evidence of this conviction would be more probative than prejudicial. The government contends that evidence of this conviction is highly probative of Ms. Ohler's truthfulness. After defense counsel stated that he believed the law of the Ninth Circuit holds that evidence of past drug usage is not relevant to truthfulness or veracity, this Court requested case law on the issue.

In *United States v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982), the appellate court found it error to rule that a defendant's prior conviction for smuggling hashish was automatically admissible should he choose to testify. The court reasoned that convictions for surreptitious activity do not bear *directly* on the likelihood that the defendant will testify truthfully. *Id.*[2]

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[2] The most common kinds of convictions probative of truthfulness are: (federal) forgery, income tax fraud, bribery, bankruptcy fraud, making false statements; (state) forgery, bribery, false pretenses, cheating, embezzlement, swindling, false advertising, fraud on creditors, issuing bad checks, etc. Weinstein's Federal Evidence, 2nd Edition, Matthew Bender, November, 1997.

In determining the admissibility of a prior conviction under Fed. R. Evid. 609(a)(1), it is the burden of the prosecution to establish that the probative value of conviction outweighs its prejudicial effect. *United States v. Hendershot*, 614 F.2d 648, 652 (9th Cir. 1980). Trial courts are to consider the impeachment value of the prior crime, when the incident occurred, similarity of the crime, the importance of the defendant's testimony, and the centrality of the credibility issue. *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995).

Where a defendant's testimony is critical in demonstrating validity of her defense, this factor weights against admission. *United States v. Jackson*, 627 F.2d 1198, 1209 (D.C. Cir. 1980). As this Court is aware, the instant case is a "border-bust" case where Ms. Ohler was driving a vehicle across the border that was found to contain 81 pounds of marijuana concealed in the side panels. Ms. Ohler is the registered owner of this vehicle. Given her ownership, the jury will certainly want to hear her testimony concerning who could have placed this marijuana in her van. No other witness can testify to the factual circumstances leading up to Ms. Ohler's arrest. Without her testimony, the defense will be deprived of an opportunity to get Ms. Ohler's defense theory in front of the jury. As such, her VI Amendment right to present a defense to the charges will be severely limited.

In *United States v. Wallace*, 848 F.2d 1464, 1473 (9th Cir. 1988), the admission of a prior conviction for trafficking in heroin was found to be prejudicial in prosecution for possession with intent to distribute heroin. Similarly, Ms. Ohler will suffer great prejudice if her prior conviction for Possession of Methamphetamine is admitted in

this case. It is reasonable to believe that some jurors will reflexively reject the remainder of Ms. Ohler's testimony due to their strong feelings against drug usage. Further, jurors might unfairly infer that one who uses drugs would also likely smuggle drugs. This would be unduly prejudicial.

While it may be correct to state that one who uses drugs is more likely to smuggle drugs than a person who doesn't use drugs, it is also undeniably true that countless people who have used drugs before would never participate in a drug smuggling venture. Accordingly, the probative value of admitting this conviction would be greatly outweighed by its prejudicial effect. The defense requests that the government be prohibited from introducing the conviction pursuant to Fed. R. Evid. 609(a)(1).

Respectfully submitted,

/s/ S. Todd Neal
S. TODD NEAL
Federal Defenders of
San Diego, Inc.
Attorneys for **Ms. Ohler**

DATED: January 26, 1998

[Exhibit Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

GOVERNMENT'S SUPPLEMENTAL BRIEF REGARDING USE OF DEFENDANT'S PRIOR DRUG CONVICTION FOR IMPEACHMENT UNDER RULE 609 OF THE FEDERAL RULES OF EVIDENCE

Plaintiff UNITED STATES OF AMERICA, by and through its counsel Alan D. Bersin, United States Attorney, and Kevin J. Kelly, Assistant United States Attorney, hereby files its Supplemental Brief Regarding Use of Defendant's Prior Drug Conviction for Impeachment Under Rule 609 of the Federal Rules of Evidence, together with the attached statement of facts and memorandum of points and authorities.

I.

STATEMENT OF FACTS

The Government respectfully requests that the Statement of Facts included in the Government's Trial Memorandum, filed with this Court on January 22, 1998, be incorporated in its entirety herein by reference.

II.

POINTS AND AUTHORITIES

A. The Evidence is Admissible Under Rule 609

Federal Rule of Evidence 609(a) provides:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. . . .

Fed. R. Evid. 609(a). If Defendant Maria Suzuki-Ohler (hereinafter, "Defendant") chooses to testify at trial, the Government should be permitted to introduce evidence of her felony conviction for possession of methamphetamine. This conviction, having occurred on April 20, 1993, represents a felony conviction less than ten years old. Thus, the Court must determine only whether the probative value of these felonies outweighs the prejudicial effect to the defendant. *See* Rule 609(a).

In *United States v. Browne*, 829 F.2d 760 (9th Cir. 1987), *cert. denied*, 485 U.S. 991 (1987), the Ninth Circuit listed five factors that a district court should balance in making the determination required by Rule 609. Specifically, the court must consider (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between

the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility. *United States v. Browne*, 829 F.2d at 762-763.[1]

In this case, it is anticipated that Defendant will claim that she was simply a victim whose van was equipped for illicit purposes of which she was totally unaware. Thus, her credibility is squarely at issue. The Government should not be prevented from demonstrating Defendant's lack of trustworthiness. *See United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979) (*en banc*), *cert. denied*, 444 U.S. 1034 (1980), *overruled on other grounds, Luce v. United States*, 469 U.S. 38 (1984) (holding that the Government should not be prevented from providing information to the jury that undercuts defendant's trustworthiness). Evidence of Defendant's conviction for possession of methamphetamine should be available for use by the Government to impeach Defendant should she choose to testify at trial.

Recent Ninth Circuit case law supports the proposition that the Government should be permitted to test the witness' credibility in this fashion. In *United States v. Alexander*, the defendant, on trial for bank robbery, sought to preclude admission of evidence concerning prior felony convictions for residential robbery and possession of rock cocaine for sale. *United States v. Alexander*, 48 F.3d 1477 (9th Cir.), *cert. denied*, 116 S. Ct. 210 (1995).

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[1] In *Browne*, the Ninth Circuit held that the district court did not abuse its discretion in admitting evidence of the defendant's prior conviction for bank robbery during a bank robbery trial. *Id.* at 764.

While noting that bank robbery was not per se a crime of dishonesty, thus rendering such evidence inadmissible under the terms of Federal Rule of Evidence 608(a)(2),[2] the Court concluded that under Rule 609(a)(1), evidence of both convictions was more probative of the defendant's credibility than prejudicial to his defense. *United States v. Alexander*, 48 F.3d at 1488.

The Court's analysis began with an affirmation of the continued viability of the 5-part balancing test to which earlier reference is made. As to part one, the Court ruled unequivocally that:

> We have previously stated that 'prior convictions for robbery are probative of veracity' (citation omitted). **The same is true of prior convictions for drug offenses.**

United States v. Alexander, 48 F.3d at 1488 (emphasis added). *See United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997) ("[p]rior convictions for drug offenses are probative of veracity, which was at issue"). Thus, in this case, case law makes undeniably clear that Defendant's methamphetamine conviction is probative of veracity.

As to part two, the conviction falls well within the 10-year time frame mandated by Rule 609(a)(1). In *United States v. Cordoba*, the Ninth Circuit held that a nearly 10-year-old (1985) conviction was not impermissibly stale.

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[2] Federal Rule of Evidence 609(a)(2) provides, in pertinent part:

> [E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. 609(a)(2).

United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997). In addition, apart from the fact that, "[b]y its terms, Rule 609 allows for the admissibility of such a prior conviction even where the defendant has been released for up to ten years," Defendant should not be permitted to mislead the jury into believing that she had one aberational episode. The Ninth Circuit has addressed this point in emphatic terms:

> [It] is not surprising that the [district] court was unwilling to let a man with a substantial criminal history misrepresent himself to the jury, with the government forced to sit silently by, looking at a criminal record which, if made known, would give the jury a more comprehensive view of the trustworthiness of the defendant as a witness.

United States v. Alexander, 48 F.3d at 1488, quoting *United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979) (en banc), *cert. denied*, 444 U.S. 1034 (1980), *overruled on other rounds*, *Luce v. United States*, 469 U.S. 38 (1984).

This is not a Defendant who has led a law-abiding and clean life, save for the instant charges. She was charged with a drug offense and entered a diversionary program in 1991; she pled guilty to possession of a controlled substance in 1993; and she tested positive for amphetamine/methamphetamine while on pre-trial release in the case at bar.

As to part three, Defendant was convicted of possession of methamphetamine use; she is not charged with marijuana importation and possession with intent to distribute. The crimes are sufficiently distinct to pass the third prong of the balancing test. Indeed, in *Browne*, the

Court went so far as to say that what matters is the totality of the circumstances, such that even "a prior bank robbery conviction [is] not inadmissible per se, merely because the offense was identical to that for which [the defendant] was on trial. *United States v. Alexander*, 48 F.3d at 1488, quoting *United States v. Browne*, 829 F.2d at 763.[3]

As to the final two factors, the Ninth Circuit has held that:

> When a defendant takes the stand and denies having committed the charged offense, he places his credibility directly at issue.

United States v. Alexander, 48 F.3d at 1489. Here, knowledge is the only issue. If Defendant takes the stand, her credibility will constitute the one and only triable fact. *See United States v. Charmley*, 764 F.2d 675, 677 (9th Cir. 1985) (upholding trial court's admission of prior convictions for both bank robbery and forgery in bank robbery trial); *United States v. Oaxaca*, 569 F.2d 518, 527 (9th Cir. 1978), *cert. denied*, 439 U.S. 926 (1978) ("in light of [defendant's] alibi defense" his credibility "was a key issue in the case").

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[3] In *United States v. Perkins*, 937 F.2d 1397 (9th Cir. 1991), the Court concluded that "the admission under Rule 609 of a bank robbery conviction in a bank robbery trial is not an abuse of discretion when the conviction serves a proper impeachment purpose, such as when the defendant's testimony and credibility are central to the case." 937 F.2d at 1406. Thus, the appellate court held that although the conviction was similar to the offense at trial, such similarity did not bar admission of the prior conviction. *Id.*

Considered as a whole, the five governing factors enumerated by the Ninth Circuit favor admission of evidence of Defendant's prior drug possession conviction. The probative impact vastly outweighs any possible resulting prejudice, which can be further minimized by a limiting jury instruction.

III.

CONCLUSION

For the foregoing reasons, the government requests that it be permitted to introduce Defendant's prior drug conviction as impeachment evidence should she choose to testify at trial.

DATED: January 27, 1998.

Respectfully submitted,

ALAN D. BERSIN
United States Attorney
/s/ Kevin J. Kelly
KEVIN J. KELLY
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Trial Before the Honorable Jeffrey T. Miller, 1/28/98

[Caption Omitted In Printing]

[2] San Diego, California – Wednesday, January 28, 1998

THE CLERK: Case number two, 97-2278, United States of America versus Maria Suzuki Ohler for jury trial, first day.

MR. NEAL: Todd Neal, Federal Defenders, on behalf of Ms. Ohler, who is present on bond.

MR. KELLY: Good morning, your Honor. Kevin Kelly on behalf of the United States.

THE COURT: Good morning, counsel. I have received a supplemental pleading with respect to the – well, there are two issues that have been dealt with by Mr. Neal and a couple of issues addressed in a supplemental briefing by the Government. In any event, both sides further address the issue of the prior conviction and its possible use for impeachment purposes. I have read the pleadings that have been submitted.

Additionally – Mr. Neal, is there anything else you'd like to mention at this time?

MR. NEAL: Your Honor, I also addressed the issue of evidence of poverty of welfare status, the admissibility of that evidence.

THE COURT: I think we have that issue resolved at this point unless there was some further request on the part of the Government to use general

evidence of poverty as evidence of a propensity or motive to commit the crime with which the defendant is charged.

[3] MR. KELLY: Your Honor, just to be clear, at the last hearing it was the Court's ruling that, as I understood it to be, we'd take it more or less on a question-by-question basis as trial developed, and the Court would determine whether it was relevant.

THE COURT: I think the last time we were together, I expressed some concern about any evidence of mere poverty or financial status, overall financial status, as a motive, and I think the cases express that same concern and make the distinction between generalized financial status or poverty and a specific basis of financial need. That's been addressed in Mr. Neal's supplemental briefing. I think you've had an opportunity to review that, Mr. Kelly.

MR. KELLY: I did, your Honor. Your Honor, do I understand the Court's ruling, however, to permit the Government to broach the subject of the defendant's financial condition as it relates to other perhaps relevant testimony and evidence more specifically apart from the motive – in a general sense that the defendant is addicted to drugs and therefore needs money, and more specifically, for instance, how she can afford to purchase a van six weeks before – before she's stopped at the San Ysidro, port of entry, a van for which she –

THE COURT: You're mixing a lot of things here together. First of all, you're attempting to bootstrap into the defendant's financial status the fact now that she was addicted [4] to drugs, and I'm not aware of any evidence indicating that she was addicted to drugs. And now

you're talking about recent purchases of the defendant juxtaposed against apparently some generalized lack of financial ability to make big ticket purchases, and that, once again, gets back into that. So you're mixing an awful lot of things here together.

We were speaking about specifically the admissibility of general financial status, general poverty, on the issue that's being addressed and evidence of general poverty, general financial status. The mere fact that a defendant is on welfare or receiving welfare benefits I think under the circumstances of this case would be inadmissible as I read the cases.

Now, if there is some other specific, particularized instance of financial status that you feel falls within the distinction made by the cases, I'd be happy to hear it. But to all of a sudden move into an inquiry that she's an alleged addict is not what that inquiry is about.

MR. KELLY: Your Honor, perhaps I have not made myself clear. I understand the Court's ruling with respect to the drug addiction, and I will certainly abide by the Court's decision. What I'm wanting is greater clarification apart from that issue, completely distinct, as to the relevance with respect to the defendant's financial condition and her ability to purchase a vehicle merely six weeks before she was stopped at the San Ysidro port of entry.

[5] THE COURT: The only way you could use something like that would be to establish as a predicate her general financial status or her general poverty, then to compare the fact she made a vehicle purchase to her

general state of poverty or the fact that she's on welfare. That is what I think the cases say you cannot do.

MR. KELLY: Your Honor, I think it paints a misleading portrait of the defendant, but I'll obviously abide by the Court's ruling.

THE COURT: I'll be happy to look at any case that you'd like to proffer on that particular issue. I haven't seen anything thus far.

MR. NEAL: And in terms of it being potentially misleading, I of course will not suggest to the Court that she's a rich woman who would have no reason to ever consider doing this. But I believe that your Honor's recitation of the case law is correct. I would ask that Government counsel be instructed to instruct his witnesses not to testify that she was collecting welfare benefits. I think it falls under this umbrella of law, and I think it's also inadmissible under 403 grounds.

THE COURT: I think that's the only issue before me at this particular point, that is, the admissibility that the defendant was receiving welfare benefits. As I've said, that falls within the proscription against generalized evidence of [6] poverty. And counsel is certainly aware of the ruling. I know that he'll alert his people. He doesn't need to be ordered by the Court to do that.

MR. KELLY: I will, your Honor.

MR. NEAL: Thank you, your Honor.

THE COURT: All right. The other issue, once again, deals with the use of that prior conviction for

impeachment purposes. Anything further on that, Mr. Neal?

MR. NEAL: Your Honor, I think we have argued it fully, and we've briefed it. I don't know if there's a particular prong of the five considerations that your Honor would like us to address. I focused mostly on whether that conviction for personal use possession of methamphetamine is probative of Ms. Ohler's truthfulness because on Monday that is what the Government's proffer was for saying that this evidence would be more probative than prejudicial. And I believe that the case law states that personal drug usage is not indicative of a person's truthfulness. So I'd submit on that.

THE COURT: Does the case law say that? I don't think you've cited a case that says that, that personal drug usage is not indicative of credibility or lack thereof.

MR. NEAL: I believe –

THE COURT: I have questioned that myself, and I have had authorities now brought to my attention – obviously we have the five-point test that was enumerated in the *Brown* case, and [7] then Mr. Kelly cites the *Alexander* case dealing with prior convictions for bank robbery and a drug offense. The drug offense in that case happened to be sales of illegal drugs, not mere possession for personal use, although there is a generalized statement in *Alexander* that drug offenses, that is, prior convictions for drug offenses can be utilized for impeachment purposes.

Now is this Court to limit that language to the drug offense that was before the *Alexander* court or am I to take a broader reading of that particular statement? I have not seen any case submitted by you though, Mr. Neal, that indicates that drug convictions predicated upon personal use should not be used for impeachment purposes.

MR. NEAL: Well, I believe that the Mirmanish (phonetic) case I cited on page 4 is supportive of that case. I believe the *Wallace* case I cited on page 5 is also supportive of that.

THE COURT: Are you saying that one of those cases specifically states that a drug offense, a prior drug conviction based upon personal use rather than trafficking or sales or importation or manufacture, should not be used?

MR. NEAL: I believe those cases specifically dealt with past conduct relating to smuggling or trafficking, your Honor. That's true, they did not focus directly on a personal use prior; however, the other cases that I've cited, and going [8] back to some of the treatises such as Winestein's Federal Evidence, the priors recognized by the case law to be most probative of truthfulness relate more to fraudulent forgery, false representation type behavior. And we know that so many people in the country use drugs on a personal use level, and to say that because a person has used drugs before that that means they are likely untruthful I believe is a quantum leap. I think the relevant effect of this evidence would be that a lot of the jurors would decide that Ms. Ohler is someone who has used drugs before and therefore she knows what this whole drug smuggling business is all about and I

think that that is just incorrect. A lot of people have used drugs before, I submit, that would have no idea how drugs are purchased on a wholesale level, how they are brought into the country, and I just don't think that this prior conviction can survive that 403 test because what little probative value there is – if there is some small part of personal use drug, a personal use drug conviction, if there is some probativeness of that to say that this person is probably less likely to be truthful than a person who doesn't have that type of prior, that may be a fair statement, but I think it's minimal, the probative value of that. And when you compare it to the prejudicial effect that it's going to have, I think it outweighs it, and it's the Government's burden of proof when offering a prior conviction under 609 to establish that it will be substantially more probative than prejudicial, and I [9] don't think this one can satisfy that test. And for that reason I don't think your Honor should allow it for 609 purposes.

THE COURT: Mr. Kelly?

MR. KELLY: Your Honor, the Court invited the parties to submit authorities on the subject. I found clear Ninth Circuit precedence, albeit in the context of importation. *Alexander* states, however, unequivocally prior drug offenses; it doesn't qualify it. The Ninth Circuit says prior drug offenses. The Ninth Circuit had the opportunity to revisit that in *Cordoba*. The Ninth Circuit came back down and reiterated that prior drug offenses are probative of veracity.

That was what your Honor was looking for from the Government, authority for that proposition. Mr. Neal has not cited anything. In fact, Mr. Neal's cases go to either

the 609 (a)(2) prong, which deals with truthfulness, or the 608 (b) analysis, which also deals with truthfulness. And in that context he may well be right that the forgeries and the frauds, et cetera, et cetera, might be more applicable to those specific provisions of the Federal Rules of Evidence. But 609 (a) (1) is now, in the context of these cases, it's very clear drug offenses are probative of veracity.

I've cited numerous cases in which – with respect to the prejudice. All five prongs are easily satisfied particularly, your Honor, and I don't want to hit this issue too, too hard, but the OSC letter of which your Honor is now the [10] recipient indicates once again this is not a person who is lily white. If she chooses to take the stand, your Honor should examine the totality of the circumstances, as precedence requires, and say it would be misleading. It would be just as if when the Ninth Circuit said it is not surprising that the district court was unwilling to let a man with substantial criminal history misrepresent himself to the jury with the Government forced to sit idly by looking at a criminal record which, if made known, would give the jury no comprehensive view of the truthworthiness (sic) of the defendant as a witness.

With that I would submit, your Honor.

MR. NEAL: Make I make one brief final point? I believe that this would be an illogical analysis. To say that trafficking is obviously a greater offense than using – to smuggle drugs is worse under the law than to use drugs.

If we can agree that the case law says that smuggling or trafficking in drugs is not probative of truthfulness, how can the lesser offense then become – the lesser

offense being using drugs – then become probative of truthfulness? It defies logic.

THE COURT: I think you may be in error there. I don't think there's case law that says smuggling or trafficking of drugs and convictions therefore are not probative of the issue of credibility.

MR. NEAL: Your Honor, those are the cases that I just [11] spoke of, Mirmanish and *Wallace* that I cited in my papers that hold that. I thought that your Honor was saying you've seen cases that stand for the proposition that trafficking is not probative of truthfulness, but I haven't cited a specific case that says personal use is not probative of truthfulness.

What I'm saying, if the case law says trafficking is the greater offense, how can we say the lesser offense of using is –

THE COURT: *Alexander* is the latest case on point, is it not, from this circuit?

MR. KELLY: Actually, your Honor, I would submit that *Cordoba* is probably the latest case. But the more full description would be *Alexander*, yes.

THE COURT: As I understand Mirmanish, Mr. Neal, that case basically held that it was error for the trial court to automatically hold that a drug smuggling conviction was admissible without some kind of analysis. Isn't that what that case stands for?

MR. NEAL: In addition to the fact that I believe the Court held that convictions for surreptitious activity such as smuggling do not bear directly on the likelihood that a defendant will testify truthfully, and that is why

I'm saying that case stands for the proposition that a trafficking conviction is not necessarily probative of truthfulness.

THE COURT: The *Wallace* case of which you cite in your [12] papers was a case where basically the prior conviction for heroin trafficking was found to be prejudicial in light of the similarity of the prior conviction to the crime charged in that case and for which the defendant was on trial, another heroin charge, correct?

MR. NEAL: I don't know that similarity was the reason it was found to be more prejudicial than probative.

THE COURT: It was prejudicial because it was close. I mean they were – those types of crimes were related under I think part three of the five-part test. I think that was the basis for the ruling; is that correct?

MR. NEAL: I'm certain that that was one of the factors. I don't know that that was the strongest consideration for the Court's ruling. But again, your Honor, I do think many jurors will think that there is great similarity between Ms. Ohler's prior conviction and the allegations in this case. A lot of jurors of course have never had any involvement with them, and to them drugs are drugs, there is not a lot of difference between using and dealing and the whole ball of wax, and I believe that will result in prejudice.

THE COURT: All right. I think I've heard the arguments at this point. Mr. Kelly, do you have anything new to bring to the Court at this time?

MR. KELLY: I don't, your Honor. I would have responded to Mr. Neal, but I'm –

[13] THE COURT: I think you would have responded in a similar fashion to what you've argued previously. I do think we do need to get this issue resolved.

Well, I will say at the threshold that this is a very close call. You may not see it as such, but it is a close call. Looking at the factors under *U.S. v. Brown*, I will deny the motion in limine to preclude evidence of the defendant's prior conviction for methamphetamine use. There is some impeachment value to that. Drug offenses this circuit has indicated, do have some impeachment value. Perhaps one day we will get a refinement of *Alexander* and perhaps a distinction, if a distinction is to be made, between personal use convictions and other types of drug convictions. There is some impeachment value.

The point in time of the conviction and the witness's conduct under question in this case is not so remote so as to create undue prejudice. We're clearly well within the ten-year rule, and we have a conviction within five years. There is some similarity between the prior conviction and the charged crime in this case, but once again, the prior conviction is for mere use whereas this charge is a smuggling charge.

Mr. Neal, I think you can certainly make the distinction that you've attempted to make in argument to the Court. There is obviously some importance to the defendant's testimony in this case. But I think the centrality of the [14] defendant's credibility in this case is obviously very significant, and so that if the defendant does take

the stand, she should be capable of being impeached. And I think that the factors set forth in *Brown* weigh slightly in favor of the allowability of that prior conviction for impeachment purposes and, as I say, weigh slightly – realizing that there is a substantial prima facie case that the prosecution has to make.

I think that looking at probative value versus prejudice that the probative value is outweighed by the prejudice in light of the argument that you can make, Mr. Neal, related to time and also the dissimilarity between the convictions.

* * *

[58] THE COURT: All right. That's fine. You can deal with that I think on your voir dire. It's been brought to my attention I may have in the statement of my ruling relating to the use of the prior conviction for impeachment purposes indicated that the probative value of the prior corroboration was outweighed by possible prejudice, and if that was what I in fact said, I meant the converse to be true, that the prejudice – any prejudice would be outweighed by the probative value of the use of the prior conviction. I want to make that record clear. We'll see you at 1:30.

(There was a break in the proceedings.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Trial Before the Honorable Jeffrey T. Miller, 1/29/98

[Caption Omitted In Printing]

[4] San Diego, California –
Thursday, January 29, 1998

(Jury voir dire and opening statements, not designated as part of the record on appeal, are omitted from this transcript.)

THE COURT: Counsel are here in U.S. v. Ohler.

MR. NEAL: Good morning, your Honor. Todd Neal, Federal Defenders, on behalf Ms. Ohler; she's present on bond.

MR. KELLY: Good morning, your Honor. Kevin Kelly on behalf of the United States.

THE COURT: Counsel, it's been reported to me by Pretrial Services that defendant tested negative in connection with the test that was administered yesterday afternoon. I'm directing defendant to report to Pretrial Services this afternoon once court recesses for the day as well as tomorrow afternoon after court recesses for the day unless otherwise ordered, and I am contemplating conducting an OSC on the test results of the January 26 test, that OSC to go forward once the jury begins its deliberations in this case. So I'm sharing my thoughts with you at this time. I have advised Pretrial Services of the likelihood that they could be called to proceed with the OSC.

One further matter, and that pertains to these tests, all tests and test results that apply in this case, and it

dovetails a bit with the Court's ruling on the permissibility of [5] the prior conviction, drug conviction, for impeachment purposes. As you know, I have up to this point in time denied the Government's ability to use any test results in connection with this case as direct impeachment and also as motive evidence. I don't know if your client is going to testify in this case, Mr. Neal, but if she does, obviously the prior conviction can be used for impeachment purposes. I would like to alert you to a problem that I foresee developing depending upon how you wish to diffuse the impact, if any, of that prior conviction which could be utilized by the Government.

If you imply to the jury that that was a one-time circumstance and that there is no evidence whatsoever that your client has ever engaged in any kind of drug activity, personal use other [sic] otherwise, obviously that kind of an argument – that kind of an implication runs afoul of evidence to the contrary. It's one thing for you to attempt to distinguish between the nature of the prior offense and the charges in this case. It's acceptable for you, obviously, to make references, appropriate references as to time, but to go beyond that and to characterize the state of the evidence as somehow indicating your client has been drug free ever since may well result in an admonition from the Court; so you may open up the door there to the admissibility of that for further impeachment, direct impeachment, depending upon how the evidence comes out or how you argue, and you may run the risk of the Court admonishing the [6] jury appropriately.

I bring that up at this point to diffuse the potential for any problem along those lines, and if you have any questions, I'd certainly be happy to address them.

MR. NEAL: No, I understand completely, your Honor. Thank you.

THE COURT: Okay. All right. I think we're clear until nine.

MR. KELLY: Your Honor, I just have one sort of ministerial question, and that is the marijuana – once it's introduced into evidence – Courts vary as to how they prefer to have it laid out. I believe this is the only table in this courtroom. Does your Honor have any preference as to how to display it to the jury?

THE COURT: I don't have any preference. Your request is what at this point, Mr. Kelly, just to have it repose –

MR. KELLY: Just to avoid an awkward moment as to how your Honor would prefer that it be laid out. Clearly the end of counsel table here is a bit small. My preference I guess would be to have it in front of the Court.

THE COURT: Mr. Neal?

MR. NEAL: Well, I would just ask that after the exhibit has been admitted in evidence that it not be kept out any time longer than necessary or – if it's up in this area, I think it's fine. I've tried cases before where the Government [7] likes to put it on the very far corner of that table; I would ask that that not be done.

THE COURT: I've usually had it in the well. The table Mr. Kelly is suggesting is located basically below the bench and in the middle of the well, and I think that's appropriate. So go ahead, Mr. Kelly, you may display the drugs in that manner.

MR. KELLY: Thank you, your Honor.

THE COURT: Okay.

(There was a break in the proceedings.)

* * *

[155] MR. NEAL: Your Honor, the defense calls Maria Ohler.

Maria Suzuki Ohler

the defendant, was sworn and testified as follows:

THE CLERK: Would you please state your full name and spell the last name for the record.

THE WITNESS: Maria Suzuki Ohler, O-h-l-e-r.

Direct Examination

BY MR. NEAL: Q. Ms. Ohler, I'd like to start with some background information. Where do you live?

A. 4019 Cottonwood Street, San Diego.

Q. How long have you lived at that address?

A. Three and a half years.

Q. And how long have you lived in San Diego?

A. Most of my life.

Q. Where were you born at?

A. I was born in Tijuana, Mexico.

Q. And what is your citizenship status?

A. American citizen.

Q. And how did you become an American citizen?

A. My father made me use it.

Q. Is that by virtue of naturalization?

A. Yes.

Q. Ms. Ohler, are you married?

A. No, I am not.

Q. Have you ever been married?

[156] A. Yes, I have.

Q. Are you divorced now?

A. Yes, I am.

Q. When were you divorced?

A. Ten years ago.

Q. Ten years ago?

A. Uh-huh.

Q. Do you have any children?

A. Yes, I have four.

Q. Do your children live in San Diego?

A. Yes, they do.

Q. Do you have other family in San Diego as well?

A. Yes, I do.

Q. And do you have family that lives in the same area that you live in?

A. Yes, they do.

Q. Who are some of those relatives?

A. I have an uncle and a – some cousins that live near by me and my niece.

Q. You've lived in the same house for three and a half years?

A. Yes.

Q. Do you currently have a phone at that –

A. No, I do not.

Q. You have no phone in that house. Have you ever had a phone in that house?

[157] A. Yes, I have.

Q. Do you remember when the service was disconnected on that phone?

A. About seven months ago.

Q. Was the service disconnected before or after you were arrested in this case?

A. It was before.

Q. Do you remember how long before?

A. No, I do not.

Q. I'm not meaning to pry into your personal affairs, but why is it that your phone was disconnected?

A. I was unable to pay it.

Q. Have you ever been convicted of a crime?

A. Yes, I have.

Q. How many times?

A. Once.

Q. When did this happen?

A. Five years ago.

Q. What was the charge you were convicted of?

A. I was under the influence of methamphetamine.

Q. Did you go to jail on that case?

A. For the weekend.

Q. What was the sentence that you received?

A. Probation, I believe, and a rehabilitation completion that I needed to do, which I did.

[158] Q. Did you plead guilty in that case or did you have a trial?

A. I pleaded guilty.

Q. Do you have any other criminal convictions?

A. No besides this one.

Q. I want to ask you some questions about the van that some of the witnesses have testified about in this case. Whose van was that?

A. Mine.

Q. And how long had you owned this van?

A. Well, I got it in June 12, and I registered it on June 17.

Q. You were arrested on July 29?

A. Yes, I was.

Q. And as of the date of your arrest, this van was registered in your name?

A. Yes, it was.

Q. What kind of a van is this?

A. It's a GMC van.

Q. Do you know what year?

A. I believe it was an '84.

Q. Ms. Ohler, how much did you pay for the van?

A. I paid $1200 for it.

Q. Where did you buy this van?

A. I bought it in National City on Division where it was for show; they park It there and they have a for sale sign, you call the number, and the people met with me there.

[159] Q. Tell us what the situation was; did you go to someone's house or did you meet –

A. No.

Q. – where the van was parked?

A. I called their number and they met me at the spot where the van was left so the people can see you.

Q. Did you meet them on the same day that you called about the van?

A. Not the same day. I think I met them about a day or two later. I'm not sure. It wasn't the same day.

Q. When you met these people at the van, did you buy it that very same day?

A. No, I didn't.

Q. How much longer after this occurred – how much time passed until you bought it?

A. Two days, two days later.

Q. And who were the people that you bought it from?

A. It was a Mexican couple, and I did the dealings with the lady, the Mexican lady.

Q. How many times did you meet with them?

A. I met with them a couple of times only.

Q. Where did these meetings take place?

A. Where the van was parked –

Q. Any other place?

A. – in National City on Division Street.

[160] Q. Did you ever meet at any other location regarding this van?

A. No, I didn't.

Q. You've heard some testimony about some DMV documents in this case?

A. Yes.

Q. I'd like to show you what's been admitted into evidence as Government's Exhibit 9. Now, Maria, in Government's Exhibit 9 I've turned to a page that's entitled I believe statement of facts; do you see that?

A. Yes.

Q. And there is a factual statement that is written out regarding the sale of this van?

A. Correct.

Q. Did you write that?

A. No, I didn't.

Q. Do you recall what papers you signed when you purchased the van?

A. Just the one that they had. I signed the back of the pink slip where the names of the two people were on it, but the DMV told me to sign it – when I took all the paperwork, they asked me to take it back.

Q. When you bought this van, did you pay for it in cash?

A. Yes, I did.

Q. What papers did the seller give you?

A. well, when I paid for it, they didn't give me anything, just [161] gave me the pink slip. I went with that to the DMV. I never realized it was written on the back of the paper.

Q. So you gave them $1200, and they gave you the pink slip and the van?

A. Uh-huh.

Q. I'm sorry. You need –

A. Yes.

Q. – to say yes for the record.

A. Yes.

Q. Maria, how long after you paid for the van was it when you went to DMV?

A. That same day.

Q. And did you register the car that same day?

A. On the 17th, yes.

Q. Did you end up going back there later?

A. Yes. I went back because they gave me the papers to give to the people to fill out, and that's what I did. I called the people up and they agreed to meet with me again. I gave them the papers then, the ones that I got, and they filled them out.

Q. How many times did you go to DMV then?

A. Twice.

Q. Was this in a one-week period?

A. No, same day.

Q. How did you contact the people after you went to DMV the first time and you obtained the documents?

[162] A. I called them.

Q. Do you know if the van had a current registration sticker at the time you bought it?

A. No, I didn't notice it.

Q. Do you remember how much you had to pay in registration fees at DMV?

A. $346.

Q. Do you know why it was so much?

A. No, I didn't know then, but when they told me because the people that the names were in the back of the paper, they never went to register it in their name.

Q. Were you told whether the registration had expired?

A. Yes, it was expired.

Q. Was it your understanding that a portion of that $346 was to pay back registration fees?

A. Yes.

Q. Do you know a man named Francisco Gomez?

A. Yes, I do.

Q. Who is Francisco Gomez?

A. An acquaintance of mine, an ex-acquaintance now.

Q. And where did you meet this person?

A. At a Mexican club.

Q. What is this club called?

A. Jackie's Place.

Q. Where is Jackie's Place located?

[163] A. On Main Street in San Diego.

Q. And did you go to Jackie's Place on a regular basis?

A. I used to work there.

Q. And did Francisco also work there?

A. No, he was just a customer there.

Q. When was it that you worked at this club?

A. Two years ago.

Q. And what was your job there?

A. Waitress.

Q. And for how long a period of time did you work there?

A. I worked there for almost a year.

Q. And you met Francisco Gomez while working there?

A. Yes, I did.

Q. You were – do you recall approximately when it was that you met him?

A. No, I do not.

Q. How long ago?

A. Well, I worked there two years ago and I worked for almost a year, so – I still went to dance there, but I wasn't working there. I met him about a year and a half now.

Q. After you stopped working at this club called Jackie's Place, did you maintain a friendship with Francisco Gomez?

A. Yeah, I would run into him there.

Q. Did you ever socialize with him outside of the bar?

A. Yes, we did, a couple of times.

[164] Q. Where would this take place at?

A. At my house.

Q. Was this a friendship or a romantic –

A. A friendship.

Q. How many times was Francisco Gomez at your house?

A. I would say about four times, five times.

Q. I assume you told him where you lived?

A. Yes.

Q. Did you ever give him Irma Fernandez's phone number?

A. Yes, I did.

Q. Did you give that phone number to other friends of yours as well?

A. Yes, I would.

Q. Is there any other person that would receive messages for you other than your niece Irma?

A. No, not that was close enough. My daughter would, but she wasn't close enough to come and bring them to me, so –

Q. Do you know if Francisco Gomez ever called you at Irma Fernandez's house?

A. Yes, I do.

Q. Do you know how many times?

A. Twice.

Q. What was the purpose of the first call?

A. He needed me to pick him up to give him a ride to a friend's house or something like that, and

[165] Q. Where did he need to be picked up at?

A. At Jackie's Place, in front of Jackie's Place.

Q. How did you learn that he had called Irma's house?

A. My niece came.

Q. When she gave you that message, did you pick him up?

A. Yes, I did.

Q. What vehicle were you driving when you picked him up?

A. The van.

Q. Do you know if Francisco Gomez had a car of his own?

A. Not that I know of.

Q. Did you ever allow him to drive your van?

A. Yes, I did.

Q. How many times?

A. Twice.

Q. And you would allow him to take the van without you being with him?

A. I did that twice, but only to run some errands, and he brought it right back.

Q. So for how long a period of time would you let him use the van?

A. How long he used the –

Q. An hour a day?

A. Couple of hours. Then he'd bring it right back.

Q. I want to ask you some questions about the evening of July 28, the night before you were arrested. Do you remember that [166] evening?

A. Yes, I do.

Q. And you were arrested on July 29?

A. Yes, I was.

Q. And what time of day was it when this happened when you were arrested?

A. I was arrested the following day in the morning.

Q. The night before, the night of July 28, do you recall where you were that evening?

A. I was at home. I was at home.

Q. Did you see Francisco Gomez that night?

A. Yes, he showed up at my house.

Q. And do you remember about what time it was when he arrived at your house?

A. He arrived about 7:30 in the evening.

Q. Were you –

A. He was – sorry – he was – he arrived with a 12-pack of beer around that time.

Q. Were you expecting him to come by?

A. No, I wasn't.

Q. Did you mind that he just dropped in on you?

A. No, I didn't mind.

Q. So you allowed him into your house?

A. Yes, I did.

Q. And how long did he stay at your house?

[167] A. He stayed until about before nine in the evening. Then he left.

Q. So he was there for a couple of hours?

A. Yes.

Q. And what happened during the couple of hours that he was at your house?

A. Well, we were drinking. He was already really halfway drunk practically, and he was drinking his beer

pretty fast. And we were just chitchatting over really nothing worthwhile and he seemed like he was in a bad mood and restless and really had no meaning for him being there in the first place, you know, no purpose for him being there; I didn't feel like he was there just visiting me. We continued to talk, and then my cousin showed up.

Q. Who is your cousin?

A. Peter.

Q. What is Peter's last name?

A. Bernal.

Q. And how long was Peter at your house?

A. He was there a few minutes only, 15 minutes.

Q. Did Peter meet Francisco Gomez?

A. Yes, he did.

Q. Did Peter and Francisco Gomez talk?

A. Well, I just introduced them, and as soon as I introduced them, Francisco stepped out of the house. And I offered my [168] cousin a beer and he sat down with me and talked with me and then afterwards he left after he finished his beer.

Q. Did you ask Francisco to step out of the house while you and Peter were talking?

A. No, I didn't.

THE COURT: Ms. Ohler, please let counsel finish his question before you begin your answer. Thank you.

THE WITNESS: Okay.

BY MR. NEAL: Q. Do you know why he stepped out of the house?

A. No, I do not.

Q. When Peter left, was Francisco still at your house?

A. Yes, he was.

Q. Do you remember what happened when Francisco left your house?

A. Well, after my cousin left, he came back in the house and he went directly to where my car keys are at and he grabbed the keys and he left in the van. And I thought he was going to the store because there was no more beer for him.

Q. Did he ask you if he could take your van?

A. No, he didn't.

Q. Did he tell you where he was going?

A. No, he didn't.

Q. What did you do while he was gone?

A. Basically nothing. I just sat there, watched some TV, and [169] waited for him to come back.

Q. Did he ever come back?

A. No, he didn't.

Q. When was the next time that you learned something about your van?

A. When my niece came to tell me about the van, and that was late at night already.

Q. Was this the same night?

A. Yes, it was.

Q. Do you remember approximately what time it was?

A. No, I do not because I was already – I was falling asleep on the sofa. It was already late.

Q. When your niece arrived at your house, were you upset about Francisco being gone?

A. Well, when she arrived, I thought it was him. When the doorbell rang, I jumped up, I opened the door quickly, and I – I go what – I go what's wrong, and she said nothing, I just came to give you a message, and she told me that he asked her to come and tell me that my van was across the border, if I wanted it to go pick it up.

Q. What was your reaction to learning this?

A. I was upset. I was very upset because, you know, I didn't give him permission, for one, at all take that van, for him to take it all the way to Mexico; it didn't even have insurance, so –

[170] Q. Did you have any idea how you were going to get your van back?

A. The only idea that came to mind was my niece, and that's when I asked her.

Q. Did she agree to take you to the border?

A. Yes, she did.

Q. When was she going to take you to the border?

A. She told me in the morning after she dropped off her boyfriend.

Q. Did she pick you up the next morning?

A. Yes, she did.

Q. About what time was it when that occurred?

A. I remember it was around 6:30, 6:40.

Q. Were you ready to go when she arrived?

A. Yes, I was. I just didn't have my makeup on.

Q. Did anyone go with you to the border?

A. No. With me personally?

Q. In the car with you and your niece.

A. My nephew, my niece and her son.

Q. Where did your niece take you to?

A. She dropped me off in the last – the last exit that you can take before you get to the border.

Q. And what did you do from there?

A. I walked to TJ.

Q. Did you know where your van was parked?

[171] A. No. I had to look for it in the parking lots that were there.

Q. Did you find it?

A. Yes, I did.

Q. How long did it take you to find it?

A. Not very long because I looked in the first parking lot which is visible, and then continued to walk. I walked in all the way. I would say a few minutes.

Q. Had Francisco Gomez left the keys in the van?

A. No. I had my spare.

Q. But when you got into the van, were there – was there another set of keys there?

A. No, my keys were not in the van.

Q. Once you found your van, what did you do after that?

A. I bought myself a cup of coffee and a doughnut, and I exited the parking lot. And I almost went the wrong way in the turn I made – I was going to make a U-turn. That's not allowed, so I didn't know where I was going to or where to go to until an officer, Mexican police officer, stopped me and he told me what was I doing or where was I going. I told him I needed to get to the border, and he directed me to the border.

Q. Did you end up finding your way to the port of entry?

A. Yes, I did.

Q. And when you got up close to the port of entry, was there a line at the border?

[172] A. There was a couple of cars; there was about eight or nine cars ahead of me.

Q. Did you do anything while you were waiting in line?

A. Yes. I started applying my makeup.

Q. And what were you using to do that?

A. Well, I wasn't using the rearview mirror; I was using a compact.

Q. Something that was in your purse?

A. Yes.

Q. Do you recall an inspector approaching your van to ask you some questions?

A. I recall him coming up to the window.

Q. And when he got up close to your van, what were you doing then?

A. I was still applying my makeup.

Q. Do you remember what questions he asked you?

A. If the van was mine.

Q. What did you tell him?

A. And I said yes. And then he asked me for my driver's license and registration.

Q. Did you have a driver's license?

A. Yeah. I gave it to him.

Q. Sorry?

A. Yes. I'm sorry.

Q. And did you also provide him with the registration?

[173] A. Yes, I did.

Q. Approximately how many questions did he ask you?

A. Well, he asked me if he – he can take a look in the back of my van, and I told him go ahead, you know, and so he was already with other people, other guys with him, other immigration officers and the dogs, and he opened the back and I don't know what they were doing in the back. I continued to apply my makeup.

Q. Well, at some point when he first approached the van, was he alongside the driver's side window?

A. Yes.

Q. And he stood there and asked you a few questions?

A. Uh-huh.

Q. What did you do while he was asking you these questions?

A. Well, I answered him the questions.

Q. Did you continue applying your makeup?

A. After he was done with the questions, I continued to apply my makeup.

Q. Were you annoyed or upset that you were being asked these questions?

A. Well, I wasn't annoyed at him, I was just annoyed that I had to go and get my van in the way I had to go get it, you know, when I had no business going after my van.

Q. Maria, do you remember at some point being asked to turn off the van?

[174] A. Yes, I do.

Q. And what was your reaction to this request?

A. Well, I was surprised, but I did it anyway.

Q. And after you turned off the van, were you at some point requested to get out of the van?

A. To get – gather my things and to step out of the van.

Q. Did you do this?

A. Yes. I was gathering my things when I was pulled off the van and thrown against the van and handcuffed.

Q. And what was your reaction to this?

A. Well, I was startled, but I didn't want to say anything more.

Q. Did you know whether you were being arrested?

A. I didn't ask him that until he escorted me past the border and into the building. That's when I asked him am I being arrested.

Q. Did you know that there was marijuana in this van?

A. No, I didn't.

Q. Were you trying to bring marijuana across the border?

A. No, I wasn't.

MR. NEAL: Nothing further.

THE COURT: Cross-examination?

MR. KELLY: May I have just one moment?

THE COURT: Certainly.

[175] Cross-Examination

BY MR. KELLY: Q. Good afternoon, ma'am.

A. Good afternoon.

Q. I'm not sure I heard clearly, ma'am. You bought – from whom did you buy the van?

A. A Mexican couple.

Q. A Mexican couple. And where did you meet them?

A. Met them on Division where the van was with the for sale sign.

Q. I'm sorry. The van was standing outside?

A. No, the van was parked on Division Street in National City with a for sale sign.

Q. Was there a phone number on –

A. There was.

Q. You called that phone number?

A. I did.

Q. Was it parked in front of somebody's house?

A. No, it was parked on the side of the street.

Q. But they met you on that day?

A. No, they met me two days later.

Q. What were they asking for it?

A. What do you mean?

Q. How much money did they want for the van?

A. They wanted $1200 for it.

Q. So you paid them exactly what they were asking?

[176] A. Yes, I did.

Q. Then you went down to DMV that day?

A. Yes, I did.

Q. That very day?

A. Not the day I bought it. I bought it on the 12th, I went down on the 17th.

Q. Okay. Which is it, you just –

A. I bought it on the 12th and I went to the DMV on the 17th.

Q. And you paid $346 in fees?

A. Yes.

Q. Did you pay cash for those fees?

A. Yes, I did.

Q. Did you go to DMV directly personally?

A. Yes, personally, yes.

Q. Personally. And you paid for the van in cash?

A. Yes, I did.

Q. So the total you paid was $1546?

A. Total.

Q. Total. Ma'am, your phone was disconnected on – in July sometime?

A. Correct.

Q. And that was because you couldn't pay?

A. The reason I couldn't pay is because I did save up for the van.

Q. By whom are you employed, ma'am?

[177] A. I'm not employed right now.

Q. Ma'am, Francisco Gomez – you said that you met him two years ago; is that right?

A. Yes.

Q. And that was at Jackie's Place?

A. Correct.

Q. And you developed a friendship with him?

A. An acquaintance.

Q. Where does Francisco Gomez live?

A. I don't know.

Q. What's his phone number?

A. I don't know his phone number either.

Q. Where does he work?

A. I believe he works – somewhat of a mechanic here and there. I don't know where exactly.

Q. Do you know any of Francisco Gomez's friends?

A. I met one acquaintance of his.

Q. Who is that?

A. They called him Haro (phonetic). His name is Jose, but that's it.

Q. You developed enough of a friendship with Francisco to have him drop over to your house you said four to five times; is that right?

A. Not all in one time. In the period of time, yes.

Q. Right, four to five times?

[178] A. Uh-huh.

Q. Did he ever have you over to his house?

A. No.

Q. Did he ever ask you over –

A. No, he didn't.

Q. – to his house. And you never knew where he lived?

A. No, I did not.

Q. And you developed enough of a relationship to where you lent your car to him?

A. Yes.

Q. Ma'am, you own another vehicle, don't you?

A. Yes, I do.

Q. What is that?

A. It's a '89 Mustang.

Q. On occasion Francisco would borrow your van to run some errands?

A. He did it twice.

Q. Did you hand him the keys or did he take the keys?

A. Yes, I did.

Q. He showed up at around 7:30 one night with a 12-pack unexpectedly; is that right?

A. Yes, he did.

Q. And he was there for a couple of hours?

A. Yes, he was.

Q. With no particular purpose?

[179] A. None that I know of.

Q. What was your response when he took your keys and walked outside?

A. Well, in the way that he did it – he did it like in a harsh way. He was upset about something and he was already buzzed and we were out of beer. He didn't say anything. I just didn't say nothing to him. I just figured he's going to go get some beer and come back.

Q. Was he upset with you?

A. No.

Q. So he grabbed the keys and just left?

A. Yes, he did.

Q. And you were upset?

A. He was upset. I just didn't know why he was upset.

Q. And then you fell asleep on the couch?

A. Not right away. I just waited for him.

Q. Now, this occasion in which you went down to pick up the car, did you know exactly where you were going to pick it up?

A. All I knew it was – that he had told my niece it's across the border. So there's only two parking lots across the border, so I just went to look.

Q. Did your niece say what kind of parking lot it was, restaurant parking lot or –

A. No, she just said across the border.

Q. – a gasoline parking lot or –

[180] A. No.

Q. – a pay parking lot? It could have been any of those?

A. A what?

Q. A pay lot kind of parking lot. Could it have been any of those?

A. I don't know. It was just a parking lot. There was a lot of other cars parked there. I guess there's a pay parking lot.

Q. Did you know which lot?

A. No, I didn't.

Q. When you found your van, the keys were not in it?

A. No, they weren't.

Q. Were you pretty upset?

A. I was upset, but I was happy I found my van.

Q. How were you thinking you were going to drive that van home?

A. I had a spare keys.

Q. But you went and got coffee and a doughnut?

A. When you enter Tijuana, they got a lot of little stands where you can buy tacos, food, and they had one right there in the parking lot, which I just purchased a cup of coffee and a doughnut.

Q. You waited there for awhile?

A. No. As soon as I purchased it, I got in my van and I drove off.

Q. And then when you arrived at the port of entry, you've testified that when inspector – the first inspector came to [181] your window, they had the dog and some other guys around as well?

A. There was already a lot of them around my van.

Q. That was as he initially approached you?

A. Excuse me?

Q. That was as he initially approached you?

A. I didn't even see him coming to me. I already saw him at the window. I saw everybody else around it. I didn't think nothing of it.

Q. Did you see the dog?

A. I saw the person had a dog with him.

Q. Ma'am, isn't it true that when Inspector Merriam asked you who owned the van, you said I bought it from a lady in San Diego on June 17?

MR. NEAL: Objection, your Honor; that misstates the testimony.

THE COURT: Overruled. You may answer.

THE WITNESS: No, I did not say that.

BY MR. KELLY: Q. Did you say that you bought it from a lady in San Diego?

A. I did say that but not when he asked me the question.

Q. Ma'am, I'd ask you to refer to Government's Exhibit No. 9, which I think is in front of you; do you see that?

A. What page did you want me to –

Q. I'd ask you to look at the statement to record ownership; [182] that would be about the fourth page. Do you see that?

A. Yes.

Q. Is that your handwriting?

A. This is my writing that I filled out at the DMV.

Q. You filled that out at DMV?

A. Yes, I did.

Q. I ask you to turn to the next page – the next page; do you see that?

A. Two pages afterwards?

Q. Right, the application for transfer by new owner.

A. Yes.

Q. Do you see that page?

A. Yes, I do.

Q. Is that your signature there?

A. Yes, it is. And I also signed this at the DMV.

Q. Now, do you see where the registered owner is listed as Jacob McManus or Carla Williams?

A. Yes, I do.

Q. Do you know those people?

A. I would assume it's the couple I dealt with.

Q. You indicated earlier that it was a Mexican couple, right?

A. Well, I don't – to me they're Mexican. I don't know if that – if their last name goes with what they look like.

Q. I'd ask you to turn to the third to last page if you would, the bill of sale; do you see that?

[183] A. Yes.

Q. Is that your handwriting at the top?

A. At the top it is. I filled out where Maria Suzuki, and the Cottonwood address is where I filled out.

Q. I'm sorry. So you filled out your name –

A. Yes.

Q. – in print there?

A. Uh-huh.

Q. So that line actually reads Maria Suzuki Ohler?

A. Yes.

Q. Not Ottler?

A. No, Ohler.

Q. Ask you to look at the following page, statement of facts; do you see that?

A. Yes, I do.

Q. Is that your handwriting?

A. No, it isn't.

Q. Did you write that?

A. No, I didn't.

Q. Did you buy the GMC van from Linda McColley?

A. No, I didn't.

Q. Do you know the names of the people from whom you bought it?

A. I just saw the name Linda, but I didn't know how to pronounce her last name; I just know it was Linda.

Q. Was Linda one of the people from whom you bought it?

[184] A. The person that came to testify for you is not the lady I met with. If that's Linda, I don't know her. But I just saw the registration. The name I saw on it was Linda, not the back part.

Q. You did not buy it from Linda McColley?

A. No, I didn't.

Q. Now, you brought all of this registration paperwork to DMV when you bought it, did you not?

A. When I went with the pink slip, they gave me all the paperwork that needed to get filled out because – the people that was in back of the pink slip never registered it, so I needed them – they needed me to take these papers to the person who sold me the van to get the proper information, and that's what I did.

Q. You took it to which person?

A. To the people that sold me the van.

Q. Okay. And they –

A. To get the proper information, which that's what I did.

Q. So you went to see Jacob McManus and Carla Williams?

A. No. I called the number that was on the van for the people I dealt with. I gave them the paperwork and they did it and they gave it back to me.

Q. So then Jacob McManus and Carla Williams, they live in the Division Street area?

A. No, they did not live on Division Street. The van was on [185] Division Street with the phone number which I used to call them.

MR. KELLY: If I might have a moment, your Honor.

THE COURT: Certainly.

BY MR. KELLY: Q. Ma'am, did you also – you told Inspector Mitch Merriam that you had spent the night in Tijuana, didn't you?

A. No, I did not.

Q. Ma'am, the conviction to which defense counsel earlier referred on April – April 20, 1993, that was a felony conviction for possession of methamphetamine, wasn't it?

A. Yes.

MR. KELLY: No further questions, your Honor.

THE COURT: Mr. Neal –

MR. NEAL: Just briefly, your Honor.

THE COURT: – redirect?

MR. NEAL: Thank you.

Redirect Examination

BY MR. NEAL: Q. Was your conviction for personal use or for dealing?

A. Yes, personal use.

Q. You said when you went to the DMV the first time, they gave you some papers that needed to be filled out?

A. Correct.

Q. You contacted the people you bought the van from after that?

A. Yes.

[186] Q. Was it the man or the woman that filled out the papers that you gave them?

A. The woman is who I did the deal with.

Q. Did you ever ask either the man or the woman for any photo identification?

A. No, I didn't.

Q. Do you know if the name that they put on some of these documents listing the person selling you the van – do you know if that was their true name?

A. No, I don't.

Q. Did it matter to you at the time or did you have any reason to think it might not be their true name?

A. It didn't matter to me.

Q. When the first customs inspector asked you some questions when you were in the line, do you remember being asked if this was your van?

A. Yes, I do.

Q. And do you recall whether you said yes, it is, or whether you blurted out I bought it from a lady in San Diego?

A. No. I said yes, it is.

Q. This van was parked on Division Street?

A. Yes.

Q. Is this a street where vehicles are commonly parked that are for sale?

A. Yes, it is.

[187] Q. When Francisco Gomez left your house that evening and grabbed the keys, did he appear to be angry?

A. He appeared to be upset and restless, like I said, but I didn't know why.

Q. Had he said anything to you to indicate why he was angry?

A. No, he didn't.

Q. You were asked if you also own another car?

A. Yes, I do.

Q. And what is the other car that you own?

A. An '89 Mustang.

Q. Since you had an '89 Mustang, why did you buy this van?

A. Because I wanted to take my kids up to San Francisco, and I wanted to drive so we can see the scenery.

Q. Was this Mustang operating?

A. Not at the time; it needed a clutch.

Q. At the time you bought the van, did you have any car that you could drive around?

A. Well, if I asked a ride from my niece. I usually would walk anywhere I needed to go.

Q. How long had the Mustang been broken down at the time you bought the van?

A. It had been about two months prior to. I didn't want to drive it anymore because the clutch was really bad.

Q. Why would you pay $1200 plus $346 in DMV registration in order to buy this van when you couldn't pay your phone bill?

[188] A. Because, like I said before, I saved up enough to buy another car, which I wanted a van so me and the kids could go to San Francisco.

Q. Did you feel that it was more important for you to have a van or to have your phone turned on?

A. To have the van.

Q. Was it a van specifically that you wanted or just a car?

A. Yes, a van.

MR. NEAL: Just one moment, please, your Honor.

BY MR. NEAL: Q. What would have been the purpose of a trip to San Francisco?

A. To visit my baby sister over there.

MR. NEAL: I have nothing further.

THE COURT: Mr. Kelly, any further cross-examination?

MR. KELLY: Just one quick question, your Honor.

Recross-Examination

BY MR. KELLY: Q. Ma'am, how long did you plan to stay in San Francisco?

A. Just for a couple of weeks.

MR. KELLY: Nothing further, your Honor.

THE COURT: Anything further, Mr. Neal?

MR. NEAL: No, your Honor.

THE COURT: Thank you, Ms. Ohler. You may step down.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

vs

MARIA SUZUKI OHLER (1)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

CRIMINAL CASE NUMBER 97CR2278-JM

(Filed Apr. 27, 1998)

GARY BURCHAM, FEDERAL DEFENDERS
Defendant's Attorney

THE DEFENDANT

X was found guilty on counts One & Two of the Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count(s)
21 USC 952, 960	Importation of Marijuana (Felony)	1
21 USC 841(a)(1)	Possession of Marijuana with Intent to Distribute	2

The defendant is sentenced as provided in pages 2 through 4 of this Judgment.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 on each count for a

total of $200.00, payable forthwith; the Court also finds that the defendant cannot pay a fine.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY (30) MONTHS AS TO COUNTS 1 & 2 CONCURRENTLY.

X The court makes the following recommendations to the Bureau of Prisons:

This court recommends that this defendant be designated to an institution as close to the Dublin, CA area as possible so she can maintain a relationship with her children.

_ The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS AS TO COUNTS 1 & 2 CONCURRENTLY.

The defendant shall report to the probation office in the district to which the defendant is released within 72

hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

__ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

__ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in this judgment.

The defendant shall comply with the standard conditions that have adopted by this court on the attached page. The defendant shall comply with the special conditions (listed below).

SPECIAL CONDITIONS OF SUPERVISION

X Not possess firearms, explosive devices, or other dangerous weapons.

X Submit to search of person, property, residence, abode or vehicle at a reasonable time and in a reasonable manner by the Probation Officer or the probation officer's designee.

X Participate in a program of drug or alcohol abuse treatment, including urinalysis testing and counseling as directed by the probation officer.

X Participate in a program of mental health treatment as directed by the probation officer, take all medications as prescribed by a psychiatrist/physician, and not discontinue any medication without permission. The Court authorizes the release of the Presentence Report and available psychological evaluations to the mental health provider, as approved by the probation officer.

X Report all vehicles owned or operated or in which you have an interest to the probation officer.

X Not enter the Republic of Mexico without written permission of the court.

X Resolve all outstanding warrants within 60 days.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distribute [sic], or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

APRIL 23, 1998
Date of Imposition of Sentence

/s/ Illegible
Signature of Judicial Officer
JEFFREY T. MILLER
United States District Judge
Name and Title of Judicial Officer

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARIA SUZUKI OHLER, *Defendant-Appellant.*	No. 98-50282 D.C. No. CR-97-02278-JTM OPINION

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted March 2, 1999[1]
Pasadena, California

Filed March 9, 1999

Before: Alfred T. Goodwin, Melvin Brunetti, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Brunetti

BRUNETTI, Circuit Judge:

Maria Suzuki Ohler ("Ohler") appeals from a jury verdict finding her guilty of one count of importation of marijuana, in violation of 21 U.S.C. §§ 952 and 960, and one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Ohler contends that the district court erred when it concluded that

evidence of her 1993 conviction for possession of methamphetamine was admissible under Rule 609(a)(1) of the Federal Rules of Evidence and granted the government's motion in limine. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Facts and Proceedings Below

Ohler attempted to enter the United States from Mexico through the San Ysidro, California, Port of Entry on July 29, 1997. As Ohler, the driver and sole occupant of a 1984 GMC van, passed through the port of entry, a customs inspector noticed that someone had tampered with one of the van's interior panels. Customs inspectors searched the van and discovered over eighty-one pounds of marijuana. Ohler was arrested and subsequently indicted on August 6, 1997, for importation of marijuana and possession of marijuana with intent to distribute.

Because Ohler had been previously convicted on February 13, 1993, for possession of methamphetamine, the government filed motions in limine asking the district court to admit Ohler's prior felony convictions as character evidence under Rule 404(b) and impeachment evidence under Rule 609(a)(1). The district court denied the government's motion in limine to admit Ohler's prior conviction as character evidence under Rule 404(b) and reserved ruling on whether the prior conviction was admissible for impeachment purposes under Rule 609(a)(1). On the morning of the first day of Ohler's trial, this district court concluded that, if Ohler were to testify

on her own behalf, evidence of her past criminal conviction would be admissible under Rule 609(a)(1) to impeach her credibility.

After the government concluded its case-in-chief, Ohler testified in her own defense and denied that she had any knowledge of the marijuana discovered in the van. Specifically, she testified that the van had been taken without her permission the night before her arrest, that she had gone to Mexico simply to retrieve the van, and that she was arrested when she attempted to return to the United States. During her direct examination, Ohler admitted that she had been previously convicted of possession of methamphetamine in 1993. On cross-examination, the government asked Ohler if her prior possession conviction was a felony and Ohler answered affirmatively. Ohler then explained on redirect examination that her prior drug possession conviction was for possession of a personal use quantity rather than for possession of a distribution quantity.

At the conclusion of Ohler's two day trial, the jury found her guilty of importation of marijuana and possession of marijuana with intent to distribute. The district court sentenced Ohler to 30 months imprisonment and three years of supervised release and assessed a $200 penalty.

II. Discussion

This Court has held that, when a criminal defendant introduces evidence of his prior conviction during his direct examination, the criminal defendant waives the right to appeal the district court's in limine ruling that

the prior conviction was admissible under Rule 609(a)(1). *See United States v. Williams*, 939 F.2d 721, 725 (9th Cir.1991); *Shorter v. United States*, 412 F.2d 428, 431 (9th Cir.1969); *see also United States v. Bryan*, 534 F.2d 205, 206 (9th Cir.1976) (no reversible error even if evidence of prior conviction is not admissible when defendant introduces prior conviction into evidence). Ohler attempts to circumvent the express holding of *Williams* by arguing that *Williams* is no longer applicable after the 1990 amendments to Rule 609(a)(1). Ohler's argument is without merit.

Before Rule 609 was amended in 1990, it read:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Fed.R.Evid. 609 (amended 1990).

In 1990, the statutory limitation that a witness's prior conviction could only be introduced during cross examination to impeach the witness's testimony was removed from Rule 609. The amended and current version of Rule 609(a) reads:

> (a) General Rule. For purposes of attacking the credibility of a witness,

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

Fed.R.Evid. 609(a).

The Advisory Committee Note to Rule 609 explains why the limitation that a defendant's prior conviction could only be elicited during cross examination was removed from Rule 609. The Advisory Committee Note states:

> The amendment to Rule 609(a) makes two changes to the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to 'remove the sting' of the impeachment.

Fed.R.Evid. 609 advisory committee note. The advisory committee note demonstrates that, even prior to the 1990 amendments to Rule 609, a criminal defendant could introduce evidence of his prior convictions during his direct examination because most courts found the cross-

examination limitation inapplicable. *See, e.g., United States v. Bad Cob*, 560 F.2d 877, 883 (8th Cir.1977); *United States v. Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir.1976).

Ohler contends that "as Rule 609(a)(1) now reads, there is no limitation as to who may introduce evidence of a prior conviction under Rule 609; if the defendant wishes to 'remove the sting' of Rule 609 evidence by bringing the conviction out on direct examination, such a strategy is statutorily sanctioned." Ohler, therefore, argues that, because the strategy of "removing the sting" is now statutorily sanctioned by Rule 609, a criminal defendant does not waive the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. Ohler's argument is meritless because even prior to the 1990 amendments to Rule 609 and this Court's decision in *Williams* a criminal defendant in this circuit could "remove the sting" of Rule 609 evidence by introducing evidence of his prior convictions during his direct examination.

This Court, in 1976, examined the text of former Rule 609 and recognized that the first sentence explicitly stated that evidence of a prior conviction could only be admitted if elicited from the witness or established by public record during cross-examination. *See Dixon*, 547 F.2d at 1082 n. 2. Despite recognizing the cross-examination limitation in former Rule 609, this Court declared that "[i]t seems clear from the legislative history that on direct examination, *a party may elicit the evidence of a prior conviction from his own witness*; if the witness has forgotten or denies the existence of the conviction, the party may then introduce evidence of the conviction by public record,

even though this does not take place on cross-examination." Id. (emphasis added). The Court reasoned that the purpose of the cross-examination limitation in former Rule 609 was to insure that a prior conviction was not used to impeach a person who did not testify and that this purpose was not frustrated when a party elicited evidence of a prior conviction from his own witness during direct examination. *Id.*

Assuming, without deciding, that Ohler is correct in stating that Rule 609 now statutorily sanctions the "remove the sting" strategy that criminal defendants often employ, the 1990 amendments to Rule 609 do not reflect a true change in the law because, since at least this Court's decision in *Dixon*, a criminal defendant in this circuit has been allowed to introduce evidence of his prior criminal convictions during his direct examination. Therefore, when *Williams* was decided in 1991, a criminal defendant was explicitly allowed, despite the language of former Rule 609, to introduce evidence of his prior convictions during his direct examination. The 1990 amendments to Rule 609 do not affect the validity and/or applicability of the *Williams* decision because the "remove the sting" strategy has long been sanctioned by this Court and the 1990 amendments to Rule 609 only codify the law as it existed when *Williams* was decided.

This Court's decisions in *Dixon* and *Williams* do not stand alone. Other circuit courts have long recognized that a criminal defendant can introduce evidence of his prior convictions during his direct examination, *see, e.g., Bad Cob*, 560 F.2d at 883 ("The introduction by a witness himself, on his direct, of a prior conviction is a common

trial tactic, recommended by textwriters on trial practice."), and have also held that a criminal defendant waives the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. *See, e.g., United States v. Gaitan-Acevedo*, 148 F.3d 577, 591-92 (6th Cir.), *cert. denied, Crehore v. United States*, 119 S.Ct. 256, *and rehearing denied*, 119 S.Ct. 457 (1998); *Gill v. Thomas*, 83 F.3d 537, 541 (1st Cir.1996); *United States v. DePriest*, 6 F.3d 1201, 1209 (7th Cir.1993); *United States v. Vega*, 776 F.2d 791, 792 (8th Cir.1985). Furthermore, no circuit court has found it necessary to reexamine the waiver issue in light of the 1990 amendments of Rule 609. *See, e.g., United States v. Fisher*, 106 F.3d 622, 629 (5th Cir.1997) (defendant does not waive right to appeal); *United States v. Smiley*, 997 F.2d 475, 479-80 (8th Cir.1993) (defendant waives right to appeal); *United States v. Brown*, 956 F.2d 782, 787 (8th Cir.1992) (same). These decisions reinforce the position of the advisory committee that the 1990 amendments to Rule 609 only removed a limitation that most courts already found inapplicable and support the conclusion that this Court's decision in *Williams* has not been disturbed by the 1990 amendments to Rule 609.

Ohler's reliance on the Fifth Circuit's decision in *Fisher* to support the argument that the 1990 amendments to Rule 609 represent a fundamental change in the law that affects this Court's decision in *Williams* is misplaced. The *Fisher* decision does not address the 1990 amendments to Rule 609. *See Fisher*, 106 F.3d at 629. It simply follows Fifth Circuit precedent that holds that a party does not waive the right to appeal an in limine ruling that a prior conviction is admissible when the defendant

introduces evidence of his prior conviction during his direct examination. *Id.* (citing *Reyes v. Missouri Pac. R.R.*, 589 F.2d 791 (5th Cir.1979)). Thus, the *Fisher* decision does not rely on the 1990 amendments to Rule 609 but relies on precedent that pre-dates 1990 to conclude that a defendant does not waive the right to appeal a district court's in limine ruling when the defendant introduces evidence of his prior convictions during his direct examination. *See id.* Just as the law of the Fifth Circuit has not been affected by the 1990 amendments to Rule 609, the law of this circuit and the *Williams* decision have not been altered by the 1990 amendments to Rule 609.

Ohler argues that even if *Williams* is still good law, this case is distinguishable from *Williams* because the government in this case affirmatively moved to introduce the prior conviction. This argument is wholly without merit and disingenuous. This case and *Williams* are indistinguishable. In *Williams*, "[t]he district court ruled *in limine* that the prosecution could admit into evidence for impeachment purposes under Rule 609(a)(1) Williams's prior state conviction for possession of marijuana for sale." *Williams*, 939 F.2d at 723. Here, Ohler faced the exact same situation as the defendant in *Williams* – an adverse in limine ruling allowing the introduction of a prior conviction for impeachment purposes – and she, like the defendant in *Williams*, decided to introduce evidence of her prior conviction during her direct examination to "remove the sting" of the prior conviction. In so doing, Ohler waived her right to appeal the district court's in limine ruling that her prior conviction was admissible under Rule 609(a)(1). *Williams*, 939 F.2d at 725.

Because Ohler waived her right to appeal the district court's in limine ruling, we need not decide whether the district court erred when it determined that Ohler's prior conviction for possession of methamphetamine was admissible for impeachment purposes under Rule 609(a)(1) of the Federal Rules Evidence.

AFFIRMED.

Supreme Court of the United States

No. 98-9828

Maria Suzuki Ohler,

Petitioner,

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 18, 1999

NOV 24 1999

No. 98-9828

Supreme Court, U.S.
FILED
NOV 24 1999
CLERK

In The

Supreme Court of the United States

MARIA SUZUKI OHLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether a criminal defendant automatically waives the right to appeal a definitive, pre-trial ruling granting, over her objection, the government's *in limine* motion to impeach her with a prior conviction under Federal Rule of Evidence 609 if she attempts to mitigate the "sting" of such evidence by first testifying about the conviction on direct examination.

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CITATION OF OPINION BELOW

The district court's oral ruling was not reported and is contained in the Joint Appendix ("JA"). The United States Court of Appeals for the Ninth Circuit published its decision at *United States v. Ohler*, 169 F.3d 1200 (9th Cir. 1999).

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on March 9, 1999. Petitioner timely filed her petition for a writ of *certiorari* on June 7, 1999, within the ninety-day period allowed under Rule 13.1 of the Rules of the Supreme Court of the United States. The Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. Const. Amend. V.
2. U.S. Const. Amend. VI.
3. Fed. R. Evid. 102.
4. Fed. R. Evid. 103.
5. Fed. R. Evid. 609.[1]

[1] These provisions and the Advisory Committee's proposed amendment with corresponding notes to Fed. R. Evid. 103 are included in the Appendix ("App.").

STATEMENT OF THE CASE

On July 29, 1997, petitioner drove a van from Mexico to the San Ysidro, California Port of Entry. JA at 147. Customs inspectors searched the van and found approximately eighty-one pounds of marijuana hidden behind one of the interior panels. *Id.* Petitioner was arrested, and, on August 6, 1997, a federal grand jury in the Southern District of California returned a two-count indictment charging her with: (1) importation of marijuana, in violation of 21 U.S.C. §§ 952 and 960; and (2) possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). JA at 4-5. On November 10, 1997, the district court set a trial date of January 27, 1998 and determined that all motions *in limine* would be decided the day before trial, January 26, 1998. JA at 1.

On January 13, 1998, the government filed its motions *in limine*, which included a motion to admit petitioner's 1993 conviction for possession of methamphetamine under Rules 404(b) and 609(a)(1) of the Federal Rules of Evidence. JA at 13-15. With respect to admission under Rule 609, the motion *in limine* stated:

> The Government hereby notifies Defendant of its intention to offer the following conviction at trial under Federal Rule of Evidence 609(a)(1): Defendant was convicted of the felony offense of Possession of a Controlled Substance, in violation of California Health and Safety Code Section 11377(A), on June 29, 1993, and sentenced to 90 days jail and three years probation. Therefore, if Defendant testifies, the Government intends to use this conviction to impeach her.

JA at 13.[2]

One week later, on January 20, 1998, petitioner filed a written submission in which she objected to the government's motion *in limine* to admit her prior conviction under Rules 404(b) and 609. JA at 24. With respect to admissibility under Rule 609, petitioner argued that because it was unclear whether her prior conviction was a felony or misdemeanor, Rule 609(a)(1)'s threshold requirement that the prior conviction be a felony had not been satisfied. JA at 35-36.

As scheduled, the district court held a hearing to resolve the various motions *in limine* on January 26, 1998. JA at 42. At the hearing, the district court denied the government's motion to admit petitioner's prior conviction under Rule 404(b). JA at 56. The parties then argued whether the conviction was admissible under Rule 609(a)(1). JA at 63-69. Petitioner conceded that her prior conviction was a felony and therefore withdrew her previous argument that the threshold requirement of Rule 609(a)(1) had not been satisfied. JA at 64. Petitioner, however, continued to "object to the use of this prior conviction under [Rule] 609[,]" arguing that the probative value

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[2] Rule 609 provides in relevant part: "For the purpose of attacking the credibility of a witness . . . evidence that an accused has been convicted of [a felony] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused . . . ." Fed. R. Evid. 609(a)(1).

of her prior conviction for impeachment purposes did not outweigh its prejudicial effect. JA at 64-68.

In response, the government strenuously argued for the conviction's admission under Rule 609(a)(1). *Id.* At no time, in either its written motion *in limine* or in its oral argument to the district court, did the government indicate that it might ultimately decide not to introduce the conviction. To the contrary, the government emphasized that use of the prior conviction to impeach petitioner was "something that's important and critical to the Government's case . . . ." JA at 65.

The district court deferred ruling on the conviction's admissibility under Rule 609 so that the parties could submit supplemental briefing. JA at 68-69. The district court also rescheduled the trial for January 28, 1998. JA at 2. On January 27, 1998, petitioner filed a supplemental brief in which she cited further case law in support of her objection and "request[ed] that the government be prohibited from introducing the conviction pursuant to Fed. R. Evid. 609(a)(1)." JA at 77-79. The government also filed a supplemental brief. JA at 80-86. Once again, the government argued to admit the conviction and never mentioned any indecision regarding its intent to impeach petitioner with the prior conviction. *Id.*

Trial began the next day, January 28, 1998. JA at 87. At the beginning of the proceedings, the district court entertained further argument on the Rule 609 issue, during which petitioner again objected to the admission of her prior conviction under Rule 609. JA at 90-96. The government continued to argue strenuously for its admission and, again, never indicated that it might decline to

use the prior conviction for impeachment purposes. JA at 90-96.

After two sets of briefing and two rounds of oral argument, the district court decided that it was time to rule as it informed the parties: "All right. I think I've heard the arguments at this point. . . . I do think we do need to get this issue resolved." JA at 96-97. The district court then definitively ruled that petitioner's prior conviction was admissible under Rule 609(a)(1) and explained:

> Well, I will say at the threshold that this is a very close call. You may not see it as such, but it is a close call. Looking at the factors under *U.S. v. Brown*[*e*, 829 F.2d 760 (9th Cir. 1987)] I will deny the motion in limine to preclude evidence of the defendant's prior conviction for methamphetamine use. There is some impeachment value to that. Drug offenses, this circuit has indicated, do have some impeachment value. Perhaps one day we will get a refinement of [*United States v.*]*Alexander*[, 48 F.3d 1477 (9th Cir. 1995)] and perhaps a distinction, if a distinction is to be made, between personal use convictions and other types of drug convictions. There is some impeachment value.
>
> The point in time of the conviction and the witness's conduct under question in this case is not so remote so as to create undue prejudice. We're clearly well within the ten-year rule, and we have a conviction within five years. There is some similarity between the prior conviction and the charged crime in this case, but once

again, the prior conviction is for mere use whereas this charge is a smuggling charge.

Mr. Neal [defense counsel], I think you can certainly make the distinction that you've attempted to make in argument to the Court. There is obviously some importance to the defendant's testimony in this case. But I think the centrality of the defendant's credibility in this case is obviously very significant, and so that if the defendant does take the stand, she should be capable of being impeached. And I think that the factors set forth in *Brown*[*e*] weigh slightly in favor of the allowability of that prior conviction for impeachment purposes and, as I say, weigh slightly – realizing that there is a substantial prima facie case that the prosecution has to make.

I think that looking at probative value versus prejudice that the probative value is outweighed by the prejudice in light of the argument that you can make, Mr. Neal, related to time and also the dissimilarity between the convictions.

* * * *

It's been brought to my attention I may have in the statement of my ruling relating to the use of the prior conviction for impeachment purposes indicated that the probative value of the prior corroboration [sic] was outweighed by possible prejudice, and if that was what I in fact said, I meant the converse to be true, that the prejudice – any prejudice would be outweighed by the probative value of the use of the prior conviction. I want to make that record clear.

JA at 97-98.[3] With this crucial evidentiary issue definitively resolved, the parties selected a jury, and the trial commenced. JA at 3.

The next day, before the continuation of the trial, the district court again warned defense counsel: "I don't know if your client is going to testify in this case, Mr. Neal, but if she does, *obviously* the prior conviction can be used for impeachment purposes." JA at 100 (emphasis added). Neither at this point, nor at any other point in the trial, did the government indicate that it might reverse its intention to admit the prior conviction under Rule 609.

The government rested its case-in-chief early on the second day of trial, and, later that day, petitioner testified in her own defense. JA at 102-39. On direct examination, petitioner attempted to mitigate the "sting" of the Rule 609 evidence by testifying about the existence and nature of her prior conviction and sentence. JA at 104-05, 148.[4] Regarding the charges, petitioner testified that she had no knowledge of the marijuana hidden in the van

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[3] Although the government was actually the party who filed the motion *in limine* to admit the prior conviction under Rule 609(a)(1), the district court ultimately characterized the motion as one by petitioner to exclude the evidence. In addition, the final paragraph quoted in the text, in which the district court corrected its ruling, did not occur immediately after the ruling but did occur a short time later during voir dire.

[4] Throughout the brief, petitioner will use the phrase "attempt to mitigate the 'sting' " as shorthand for testifying about the prior conviction on direct examination in order to soften the prejudicial impact of the conviction if it is introduced for the first time by questioning on cross-examination.

and explained that another individual had taken her van to Mexico without her permission and that she was returning to the United States after having retrieved the van. JA at 114-20, 148. On cross-examination, the prosecutor's last question asked petitioner if her prior conviction was a felony for possession of methamphetamine, and she answered affirmatively. JA at 135, 148. On redirect examination, petitioner clarified that her conviction was merely for personal use, not distribution. JA at 136, 148.

Ultimately, the jury returned guilty verdicts on both counts of the indictment, and the district court imposed a custodial sentence of thirty months to be followed by three years of supervised release. JA at 140-41. Petitioner appealed her convictions to the Ninth Circuit, contending that the district court erred in admitting her prior conviction under Rule 609(a)(1). JA at 146-47. Petitioner acknowledged that in *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991), the Ninth Circuit had held that a defendant automatically waives the right to appeal an adverse Rule 609 ruling if she attempts to mitigate the "sting;" however, petitioner urged the Ninth Circuit to reconsider its precedent. JA at 149-54. The Ninth Circuit declined and instead adhered to *Williams*, concluding that petitioner "waived her right to appeal the district court's in limine ruling that her prior conviction was admissible under Rule 609(a)(1)." JA at 154. As a result, the Ninth Circuit did not entertain the merits of her Rule 609 argument. JA at 155.

Petitioner subsequently filed a petition for a writ of *certiorari*, noting that the Ninth Circuit's waiver rule had been rejected by several other circuits. On October 18, 1999, after the Solicitor General filed a brief opposing the petition and petitioner filed a reply brief, the Court granted the petition for a writ of *certiorari*. *See Ohler v. United States*, 120 S. Ct. 370 (1999).

SUMMARY OF ARGUMENT

The federal courts of appeals have taken differing approaches in answering the question presented for review. Like the Ninth Circuit, the Eighth Circuit also has held that a defendant automatically waives her right to appeal a definitive, adverse Rule 609 ruling if she attempts to mitigate the "sting." *See, e.g., United States v. Smiley*, 997 F.2d 475, 479-80 (8th Cir. 1993). Additionally, the Sixth Circuit has approved of such an approach in *dicta*. *See United States v. Gaitan-Acevedo*, 148 F.3d 577, 592 (6th Cir.), *cert. denied*, 119 S. Ct. 256 (1998). The Fifth Circuit, on the other hand, has held that a defendant does not waive appeal of a district court's Rule 609 ruling under such circumstances. *See United States v. Fisher*, 106 F.3d 622, 629-30 (5th Cir. 1997). The courts of appeals are similarly divided when considering whether attempts to mitigate the "sting" of adverse evidentiary rulings constitute waivers of appeal in related contexts. *Compare Wilson v. Williams*, 182 F.3d 562, 565-68 (7th Cir. 1999) *(en banc)* (no waiver with respect to Rule 609 ruling in civil context), *and Judd v. Rodman*, 105 F.3d 1339, 1342 (11th Cir. 1997) (no waiver with respect to Rule 412 ruling in civil context), *with Gill v. Thomas*, 83 F.3d 537 (1st Cir. 1996) (automatic waiver with respect to Rule 609 ruling in civil context). *See also United States v. Mejia-Alarcon*, 995 F.2d 982, 985-88 (10th Cir. 1993) (no waiver in Rule 609(a)(2)

context but suggesting different rule may apply in Rule 609(a)(1) context).

The abandonment or relinquishment of a right is a threshold requirement for a waiver. Thus, to resolve the confusion among the courts of appeals, the Court must first determine whether the Federal Rules of Evidence (sometimes referred to as "the Rules") provide that a defendant relinquishes or abandons her right to appeal an adverse ruling admitting her prior conviction under Rule 609 if she attempts to mitigate the "sting." Although this issue would appear primarily to involve a question concerning how the Rules should be interpreted, many of the above decisions have neglected to employ the interpretive method established by the Court for resolving such questions. This method, which is akin to normal statutory construction, looks at the plain language of the rules involved, their legislative history, and relevant policy considerations. When employing this interpretive method, it becomes clear that a defendant does not abandon the right to appeal an adverse Rule 609 ruling by attempting to mitigate the "sting." Accordingly, there is no waiver.

The plain language of Rules 103 and 609 (the two rules at issue) reveals that a defendant does not abandon her right to appeal under the circumstances. Rule 103(a) sets forth the prerequisites for preserving an objection to the admission of evidence for appeal and requires a party to make a timely objection to a district court's ruling; however, the rule in no way indicates that a party relinquishes the right to appeal an adverse ruling by attempting to mitigate the "sting." Indeed, such an approach

would render Rule 103 as a whole inconsistent, as Rule 103(d) allows at least plain-error review even when a party fails to object before the district court. It would be quite odd for the rule to provide that the right to appeal the admission of evidence is not abandoned when a party fails to object but that the right is relinquished when a specific objection is made. Moreover, the plain language of Rule 609 specifically was amended in 1990 to clarify that litigants can mitigate the "sting" of prior-conviction evidence by first introducing it during direct examination. Again, it would be quite odd for the Rules to sanction attempts to mitigate the "sting" of Rule 609 evidence on the one hand but to penalize attempts to do so by requiring the relinquishment of the right to appeal rulings admitting such evidence on the other.

The legislative history of Rules 103 and 609 supports the same conclusion. The prevailing common-law approach was that a party did not abandon the right to appeal under the instant circumstances. The legislative history of Rule 103 reveals that Congress did not in any way intend to change this prevailing common-law view. Additionally, the legislative history of Rule 609 reveals that Congress was deeply concerned with the prejudicial effect that prior-conviction evidence can have on criminal defendants. A no-abandonment interpretation, at least in the specific context of Rule 609 evidence being used to impeach a criminal defendant, furthers such a concern, as it allows a criminal defendant complete freedom to mitigate the "sting" of such highly prejudicial evidence.

Policy considerations, the final prong of the Court's interpretive method, also support a no-abandonment

approach. Rule 102 sets forth three relevant policy considerations: (1) fairness; (2) elimination of expense and delay; and (3) the development of the law of evidence. With respect to the first consideration, an interpretation that requires a defendant to remain silent about her prior conviction on direct examination if she does not wish to abandon her right to appeal is unfair because a jury may wrongly perceive such silence as an attempt to hide the truth. As to the second consideration, a no-abandonment interpretation encourages a defendant to present her best case at trial, while an abandonment interpretation entails the distinct possibility that a defendant will not present her best case in order to preserve a potentially meritorious appellate issue. The no-abandonment interpretation, which encourages a defendant to present her best case at trial, eliminates expense and delay as it may result in acquittals which will obviate the need for further litigation. With respect to the third consideration, an abandonment approach seriously stunts the development of Rule 609 case law in the criminal context because appellate courts would rarely reach the merits of contested issues under such a rule. Thus, policy considerations, like the plain language and legislative history of the Rules, reveal that a defendant does not abandon the right to appeal under the instant circumstances.

Even if the Rules incorporate an abandonment approach, such a rule cannot apply to a criminal defendant because it unconstitutionally interferes with the right to testify. Although a rule requiring abandonment of the right to appeal does not constitute an outright deprivation of the right to testify, it does interfere with the free exercise of that right by exacting a price on a defendant if

she testifies about her prior conviction on direct examination. The *per se* nature of such a rule renders it unconstitutional as it arbitrarily interferes with the right to testify in situations where it is entirely unjustified. Furthermore, any interest that an abandonment rule is designed to serve does not outweigh the rule's interference with the right to testify. As a result, even if an abandonment rule is not void for arbitrariness, it still cannot withstand constitutional scrutiny.

Finally, even if the Rules can be interpreted to require the abandonment of the right to appeal under these circumstances, and even if such an interpretation can withstand constitutional scrutiny, an *automatic* waiver rule is still flawed. An abandonment of a right does not automatically constitute a waiver. Instead, an abandonment of a right must be knowing and intentional in order to ripen into a waiver. In applying an *automatic* waiver rule, the Ninth Circuit erroneously failed to make a determination as to whether the right to appeal was knowingly and intentionally abandoned.

ARGUMENT

I.

THE PLAIN LANGUAGE, LEGISLATIVE HISTORY, AND POLICY REASONS UNDERLYING RULES 103 AND 609 DICTATE THAT A DEFENDANT DOES NOT ABANDON THE RIGHT TO APPEAL A RULING ADMITTING PRIOR-CONVICTION EVIDENCE BY ATTEMPTING TO MITIGATE THE "STING."

A. Introduction

A "waiver is the 'intentional relinquishment or abandonment of a known right.' " *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Thus, the threshold requirement for a waiver is that a right must be relinquished or abandoned. The initial question for the Court, then, is whether, under the Federal Rules of Evidence, a defendant relinquishes or abandons the right to appeal an adverse Rule 609 ruling if she attempts to mitigate the "sting." The following analysis demonstrates that, when employing the Court's methodology for interpreting the Rules, a defendant does not relinquish or abandon the right to appeal under these circumstances. Obviously, because there is no "relinquishment" or "abandonment" under the Rules, there is no waiver.

B. The Court Has Established A Methodology For Interpreting The Meaning Of The Rules.

The Court has now had an opportunity to develop a substantial body of case law governing the interpretation of the Federal Rules of Evidence. This body of case law has established a well-defined interpretive methodology

by which to resolve questions concerning their meaning. While the Court now has the benefit of this precedent to guide its interpretation of the Rules, this settled framework was not in place fifteen years ago when it decided *Luce v. United States*, 469 U.S. 38 (1984), one of its first attempts at interpreting the Rules. Thus, while the Court's decision in *Luce* addresses issues related to those presented in the instant case,[5] much of the analysis that follows, which is based on the interpretive method now established by the Court, does not appear in that decision.

In the years since *Luce*, the Court has emphasized that its task in interpreting the Rules "is not to fashion the rule [it] deem[s] desirable but to identify the rule that Congress fashioned." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 508 (1989); *see also United States v. Salerno*, 505 U.S. 317, 322 (1992) ("This Court cannot alter evidentiary rules merely because litigants might prefer different

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[5] In *Luce*, 469 U.S. at 41-43, the Court held that a defendant who failed to testify could not appeal a district court's tentative finding that evidence of his prior conviction was admissible under Rule 609. In explaining its decision, the Court's leading rationale was that an appellate court is "handicapped" in reviewing such an evidentiary claim without the factual context of the defendant's testimony, particularly because it cannot determine whether any evidentiary error that may have been committed in admitting the prior conviction was harmless. *Id.* at 41-42. In addition, the Court emphasized that appellate review was barred under the particular circumstances because the district court's ruling was only tentative: *"[o]n a record such as here,* it would be a matter of conjecture whether the District Court would have allowed the Government to attack [Luce's] credibility at trial by means of the prior conviction." *Id.* at 42 (emphasis added).

rules in a particular class of cases."). In general, the Court "interpret[s] the legislatively enacted Federal Rules of Evidence as [it] would any statute." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993). Therefore, it "turn[s] to the 'traditional tools of statutory construction,' in order to construe their provisions." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (citation omitted).

In accordance with such traditional principles, the Court "begin[s] with the language of the Rule itself." *Id.* In analyzing the plain language of the rule, the Court examines the "natural reading" of its words, *United States v. Owens*, 484 U.S. 554, 561 (1988), and also "the principle behind the Rule, so far as it is discernible from the text . . . ." *Williamson v. United States*, 512 U.S. 594, 599 (1994). In addition, the Court does not simply look at the plain language of the rule in isolation but rather in conjunction with the plain language of other relevant rules. *See Old Chief v. United States*, 519 U.S. 172, 184 (1997) (analyzing language in one rule in conjunction with language in another rule); *Owens*, 484 U.S. at 562 (same); *Bourjaily v. United States*, 483 U.S. 171, 187 (1987) (Blackmun, J., dissenting) ("[I]n the case of a Federal Rule of Evidence, the rule's complex interrelations with other rules must be understood before one can resolve a particular interpretive problem.").

If the text of a rule does not answer the question presented, the Court then "seek[s] guidance from the legislative history and from the Rules' overall structure." *Green*, 490 U.S. at 509. This default method of interpretation sometimes requires an analysis of whether a common-law approach existed at the time Congress

adopted the rule in question and whether Congress sought to deviate from that common-law approach. *Compare Tome v. United States*, 513 U.S. 150, 159-60 (1995) (finding that Congress intended to carry over the common-law approach), *and United States v. Abel*, 469 U.S. 45, 50 (1984) (same), *with Daubert*, 509 U.S. at 587-89 (finding that Congress intended to supersede common-law approach). In determining such legislative intent, the Court sometimes relies on the Advisory Committee's Notes to the Rules. *See Beech Aircraft Corp.*, 488 U.S. at 165 n.9 ("As Congress did not amend the Advisory Committee's draft in any way that touches on the question before us, the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted."); *but see Tome*, 513 U.S. at 167-68 (Scalia, J., concurring) (Advisory Committee's Notes are persuasive scholarly commentary but do not possess any authoritative force in determining the meaning of a rule).

Finally, if a rule's meaning cannot be determined from its plain language or legislative history, the Court evaluates policy considerations. *See generally Daubert*, 509 U.S. at 595-97 (addressing various policy concerns in explaining Court's interpretation of rule). For example, the Court interprets a particular rule in a way that makes sense from a practical perspective and is consistent with the "general approach" of the Rules as a whole. *Beech Aircraft Corp.*, 488 U.S. at 168-69; *see also Kumho Tire Co., Ltd. v. Carmichael*, 119 S. Ct. 1167, 1174 (1999) (rejecting interpretation of rule that "would prove difficult, if not impossible, for judges to administer").

When analyzing the question presented under this three-pronged interpretive method, it becomes clear that,

under Rules 103 and 609, a defendant does not abandon the right to appeal an adverse Rule 609 ruling by attempting to mitigate the "sting." The plain language and legislative history of the two rules, as well as policy concerns, dictate such a result. Moreover, interpreting Rules 103 and 609 in this manner is not at all inconsistent with the Court's decision in *Luce*.

C. Under This Interpretive Method, A Defendant Does Not Abandon The Right To Appeal An Adverse Rule 609 Ruling By Attempting To Mitigate The "Sting."

1. Plain Language

Rule 103 sets forth the requirements for pursuing an evidentiary claim on appeal and provides in relevant part:

> **(a) Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . .
>
> * * * *
>
> **(c) Hearing of the jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means,

> such as making statements or offers of proof or asking questions in the hearing of the jury.
>
> **(d) Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Fed. R. Evid. 103. Rule 103 has not changed since its original enactment.[6]

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[6] The Advisory Committee has proposed an amendment to Rule 103 for prescription by the Court and transmission to Congress pursuant to 28 U.S.C. §§ 2072-74. *See* App. at A-5. The proposed amendment adds the following sentence to Rule 103(a): "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." *Id.* This amendment addresses the legal concept of forfeiture, a related yet distinct concept from waiver, the legal concept at issue in this case. *See Olano*, 507 U.S. at 733 ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' ") (citation omitted).

To avoid confusion, petitioner wishes to clarify that this is a waiver case, not a forfeiture case, as the Ninth Circuit held that petitioner *waived* any claim of error on appeal with respect to the district court's Rule 609 ruling because she first introduced her prior conviction on direct examination. *See Ohler*, 169 F.3d at 1202-04. As a result of the alleged waiver, petitioner could not, and did not, receive any appellate review of the claim whatsoever. *Id.* Had the Ninth Circuit only found that petitioner did not properly preserve her objection to the Rule 609 ruling by failing to renew it during trial, and thereby merely *forfeited* her claim, she would have at least been entitled to plain-error review on appeal. *See* Fed. R. Evid. 103(d). Ironically, although the Ninth Circuit held that petitioner waived her Rule 609 claim,

Nothing in the plain language of Rule 103 suggests that petitioner abandoned the right to appeal the district court's adverse Rule 609 ruling by attempting to mitigate the "sting." Rather, in order to preserve a claim of error on appeal with respect to the admission of evidence, the plain language of Rule 103 clearly states that a party merely needs to make "a timely objection or motion to strike . . . ." Fed. R. Evid. 103(a). This is exactly what petitioner did.

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its precedent clearly indicates that she did not forfeit her claim because she had already made a detailed objection to the Rule 609 evidence at the *in limine* stage and the district court definitively overruled her objection. *See, e.g., United States v. Wood*, 943 F.2d 1048, 1054-55 (9th Cir. 1991).

The Ninth Circuit's forfeiture rule (as opposed to the waiver rule at issue here) is obviously in accord with the plain language of the proposed amendment to Rule 103. Moreover, the Ninth Circuit's forfeiture rule should be viewed as the correct interpretation of the current version of Rule 103. *See Wilson*, 182 F.3d at 565 (noting the proposed amendment to Rule 103 and determining that Rule 103, as it now exists, does not require a repeated objection at trial when a definitive pretrial ruling has been made); *see also* Fed. R. Crim. P. 51 (eliminating the need for exceptions to rulings). Because the Ninth Circuit's forfeiture rule is correct, and because petitioner has not forfeited her Rule 609 claim under that rule, she would be entitled to normal appellate review, as opposed to plain-error review, when presenting the merits of her claim to the Ninth Circuit should she prevail before the Court on the waiver issue.

Despite the rather clear prerequisites set forth in Rule 103(a) for preserving an appeal of a ruling admitting evidence, one could contend that because the rule is silent as to whether an attempt to mitigate the "sting" constitutes an abandonment, the rule's plain language is not so clear. The Court, however, has rejected past attempts to transform clear language into ambiguity through speculation about what a rule does not provide. *See Bourjaily*, 483 U.S. at 179 n.2 ("Silence is at best ambiguous, and we decline the invitation to rely on speculation to import ambiguity into what is otherwise a clear rule."). Accordingly, any attempt to read an abandonment theory into Rule 103(a), a theory which is absent from the rule's plain language, should be dismissed.

Moreover, such a reading of Rule 103(a) defies basic principles of statutory construction, as it would render the plain language of the rule as a whole internally inconsistent. *See, e.g., United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993) ("It is a basic rule of statutory construction 'that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless.' ") (citation omitted). The plain language of Rule 103(d) allows appellate review, albeit under the plain-error standard, of errors that "were not brought to the attention of the court." Fed. R. Evid. 103(d). "It would be very odd" if Rule 103 allowed appellate review of a ruling to which a party never objected but, at the same time, required abandonment of the right to appeal when a proper objection was made, "and the Rules of Evidence are not so odd." *Old Chief*, 519 U.S. at 183-84.

The premise underlying an abandonment theory appears to be that although a party may have objected at an earlier time, she cannot predicate error on the objectionable evidence if she offered it first. Rule 103, however, specifically contemplates that a ruling on the admission of evidence may not occur at the same time it is offered at trial; in other words, the rule contemplates rulings at *in limine* hearings or otherwise outside the presence of the jury. *See* Fed. R. Evid. 103(c). In such instances, Rule 103(a) indicates that the predicate for claiming error on appeal is the district court's ruling, not the offering of the evidence. Indeed, the plain language of Rule 103(a) states that error on appeal "may not be predicated upon a *ruling* which admits . . . evidence unless a substantial right of the party is affected" and a proper objection is made. Fed. R. Evid. 103(a) (emphasis added). Obviously, the focal point is the district court's "ruling" admitting the evidence, not the party "offering" the evidence.

While the plain language of Rule 103 should generally be interpreted as allowing a party to appeal a ruling admitting evidence that she first introduced solely to cope with the district court's adverse decision, it certainly should be interpreted in that manner in the specific context of Rule 609 evidence. When Rule 609 was originally enacted, it provided that a prior conviction being used to attack the credibility of a witness was to be "elicited from him or established by public record *during cross-examination* . . . ." Fed R. Evid. 609 (1975) (emphasis added). In 1990, Congress amended Rule 609 by deleting this language. *See* Fed. R. Evid. 609(a) (1990). The obvious import of this change in the plain language of Rule 609 was to clarify that a party being impeached with a prior

conviction is allowed to introduce the conviction on direct examination in order to attempt to mitigate the "sting."

"[T]he principle behind" the 1990 amendment to Rule 609 is "discernible from the text," *Williamson*, 512 U.S. at 599, as the clarification was meant to encourage attempts to mitigate the "sting" of highly-prejudicial Rule 609 impeachment evidence. Thus, when reading Rules 103 and 609 together, a party whose objection to the admission of Rule 609 evidence is overruled should still be able to preserve that objection for appeal while simultaneously coping with the district court's adverse ruling. Again, "[i]t would be very odd for the law of evidence to" allow a litigant to mitigate the "sting" of Rule 609 evidence but, at the same time, forbid the litigant from appealing an adverse Rule 609 ruling if she employs this statutorily-sanctioned strategy, "and the Rules of Evidence are not so odd." *Old Chief*, 519 U.S. at 183-84.

Finally, petitioner emphasizes that this analysis of the plain language in Rules 103 and 609 is by no means inconsistent with the Court's decision in *Luce*. Other than a brief, tangential reference, *Luce* does not mention Rule 103. *See Luce*, 469 U.S. at 41 n.4. Moreover, the Court's 1984 decision in *Luce* obviously predated the 1990 amendment to Rule 609; in any event, as the defendant in *Luce* did not testify, the instant situation, in which a testifying defendant attempts to mitigate the "sting," was never contemplated.

Perhaps most importantly, *Luce* is implicitly a Rule 103 holding, as the reasons for the Court's decision dovetail with the rule's requirements for raising error on

appeal. The Court's decision that the defendant's failure to testify barred appellate review because it made harmless-error analysis impossible, *Luce*, 469 U.S. at 42, corresponds with Rule 103's requirement that error can only be predicated when "a substantial right of the party is *affected* . . . ." Fed. R. Evid. 103(a) (emphasis added). In other words, without a defendant's testimony, there is no way for an appellate court to ascertain the effect of any Rule 609 error. Likewise, the Court's explanation that the district court merely made a tentative finding with respect to the admissibility of Luce's prior conviction corresponds with Rule 103's requirement that error can only be predicated on a definitive "ruling." *Id.*[7]

In instances like this case, however, in which the district court makes a definitive "ruling" and the defendant testifies, the prerequisites for appellate review under the plain language of Rule 103 and *Luce* are satisfied. *See* Fed. R. Evid. 103; *Luce*, 469 U.S. at 43 ("We hold

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[7] The above analysis in the text is only meant to demonstrate that *Luce* does not undercut petitioner's interpretation of the plain language of Rules 103 and 609. By harmonizing *Luce* with Rule 103, petitioner does not mean to suggest that the decision should be reaffirmed. Over the years, *Luce* has received its share of criticism even though none of the eight justices deciding the case (Justice Stevens did not take part in the decision) dissented from the holding. Several state courts have rejected *Luce*, *see, e.g.*, *State v. Whitehead*, 517 A.2d 373, 374-77 (N.J. 1986), and many commentators have questioned its soundness, particularly in light of subsequent developments in the Court's precedent. *See, e.g.*, James Joseph Duane, *Appellate Review of In Limine Rulings*, 182 F.R.D. 666 (1999). In any event, this case is distinct from *Luce* and its resolution therefore requires neither the overturning or reaffirmation of that decision.

that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify."). Accordingly, an appeal should lie.

2. Legislative History

Although petitioner contends that the plain language of Rules 103 and 609 supports a no-abandonment interpretation, and thus there is no need for further analysis, the legislative history of the two rules also dictates the same conclusion. As indicated earlier, in assessing the legislative history of Rules 103 and 609, one should begin by determining whether a common-law approach existed at the time Congress adopted the two rules and whether Congress sought to deviate from that approach. *See Tome*, 513 at 159-60; *Daubert*, 509 U.S. at 587-89; *Abel*, 469 U.S. at 50. Furthermore, in making this determination, the Court has explained that "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green*, 490 U.S. at 521.

Under the prevailing common-law view, a defendant did not abandon her right to appeal under the instant circumstances. Wigmore specifically emphasized that "a party who has made an unsuccessful motion in limine to exclude evidence that he expects the proponent to offer may be able to first offer that same evidence without waiving his claim of error." 1 Wigmore, Evidence § 18, at 836 (Tillers rev. 1983). The common-law approach articulated by Wigmore corresponded with the prevailing common-law approach of the federal courts of appeals at the time the Rules were enacted.

Indeed, two years before the Rules' enactment, Chief Judge Bazelon, writing for the D.C. Circuit, clearly articulated the no-abandonment approach:

> We close by taking note of a problem of procedure. We are holding that Maynard is entitled to a reversal on the ground of the error of the trial judge in ruling that his witness, Mrs. Kemper, was subject to impeachment by a showing of her arrest and indictment, even though that fact was elicited by Maynard himself. Maynard's counsel did what he could to dilute, but he could not remove the prejudicial impact of the ruling. His offer of the evidence was in submission to the ruling of the District Court. Defense Counsel objected to the prosecution's proposal, fully argued the matter to the trial judge, was bound by the ruling. As counsel he was under a restraint against rearguing a point that had been fully argued. We think he was fairly entitled to treat the ruling as definite and complete, and to do what he fairly could to limit the prejudicial impact of the ruling.

United States v. Maynard, 476 F.2d 1170, 1175 (D.C. Cir. 1973).

Two years before *Maynard*, the Second Circuit articulated an identical rule in *United States v. Puco*, 453 F.2d 539, 541 n.6 (2d Cir. 1971), when it rejected the government's contention that the defendant had waived appeal of the district court's pre-trial decision to admit his prior conviction by referring to it during direct examination. The Second Circuit explained that "the trial judge ruled in advance of trial that, if Puco took the stand, the government could impeach him with his prior conviction. In view of this advance ruling, Puco was entitled to attempt

to offset the prejudicial effect of admission of his prior conviction by referring to it before the government did and by using it to support his defense." *Id.* Given this prevailing common-law approach,[8] the question becomes

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[8] Petitioner recognizes that the Ninth Circuit's waiver rule, as articulated in *Ohler* and *Williams*, had its genesis in a common-law case, *Shorter v. United States*, 412 F.2d 428 (9th Cir. 1969). The Ninth Circuit's decision in *Shorter*, however, does not conflict with the prevailing common-law view, as articulated in *Maynard* and *Puco*. Indeed, the Ninth Circuit's subsequent reliance on *Shorter* to articulate a waiver rule results from an imprecise reading of the decision.

In *Shorter*, the defendant made a motion *in limine* asking the district court to exercise its discretion and exclude his prior convictions for impeachment purposes. *Id.* at 429. The district court, however, "indicated that it believed the rule in [the Ninth C]ircuit favored the admissibility of the convictions . . . ." *Id.* The defendant then testified about the prior convictions on direct examination. *Id.* On appeal, the defendant raised two arguments with respect to the admission of his prior convictions: (1) he claimed that the district court wrongly exercised its discretion in admitting them; and (2) he raised a constitutional argument based on *Burgett v. Texas*, 389 U.S. 109 (1967), a case decided after his trial, that he did not specifically raise before the district court. *Id.* at 430-31. As to the first claim, the Ninth Circuit noted that "the trial court never actually ruled on this point" but nonetheless entertained and rejected its merits. *Id.* at 430. The Ninth Circuit did not entertain the merits of the defendant's new, constitutional argument reasoning that "he offered the evidence himself. . . . [and] he cannot now be heard to complain that his own act of offering such evidence violated his constitutional rights." *Id.* at 431.

Despite its subsequent interpretation, *Shorter* does not articulate a conflicting common-law approach. First, even though the district court only responded to the defendant's motion with equivocal language, *id.* at 430 ("the trial court never actually ruled" on the motion); *see also United States v. Cook*, 608

whether Congress sought to supersede it. Nothing in the legislative history of Rules 103 or 609, however, indicates that Congress sought to change the common-law approach; if anything, as set forth below, the legislative history demonstrates that Congress sought to maintain it.

With respect to Rule 103, Congress only made a technical change to the Advisory Committee's proposed rule and otherwise adopted it without comment. As stated earlier, in such situations, it is appropriate to look to the Advisory Committee's Notes to determine legislative intent. *See Beech Aircraft Corp.*, 488 U.S. at 165 n.9; *but see Tome*, 513 U.S. at 167-68 (Scalia, J., concurring). The Advisory Committee's Notes specifically state that Rule 103(a) was meant to codify "the law as generally accepted today." Fed. R. Evid. 103 Advisory Committee's Note. Accordingly, the legislative history of Rule 103, as viewed through the Advisory Committee's Notes, reveals that the rule sought to maintain the prevailing common-law view

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F.2d 1175, 1185 (9th Cir. 1979) (*en banc*) ("In . . . *Shorter* . . . the trial court never actually ruled on the admissibility of the convictions."), the Ninth Circuit nonetheless entertained the merits of the claim presented to the district court. Second, the Ninth Circuit's refusal to entertain the defendant's constitutional argument is rooted in the fact that he did not specifically raise it before the district court. Had the defendant specifically raised the constitutional claim before the district court, the decision in *Shorter* may have been different. Finally, even if the Ninth Circuit's treatment of the constitutional claim can be viewed as a conflicting, common-law approach, it did not command approval of the entire panel. *Shorter*, 412 F.2d at 434 (Foley, J., dissenting).

which allowed an appeal under the instant circumstances.[9]

With respect to Rule 609, the legislative history also supports a no-abandonment interpretation. Congress adopted the 1990 amendment to Rule 609 proposed by the Advisory Committee without comment. Thus, again,

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[9] The Advisory Committee has included notes to its proposed amendment to Rule 103. Those notes, however, specifically state that the proposed "amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to 'remove the sting' of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling." App. at A-11. Thus, the Advisory Committee's proposed amendment and its notes do not alter the above analysis.

In addition, the Advisory Committee originally contemplated including a sentence in the proposed amendment which would have codified *Luce*. After receiving critical responses, *see, e.g.*, Duane, *supra* note 7, the Advisory Committee ultimately decided not to include such a sentence in the proposed amendment and instead placed the following language in its notes: "Nothing in the amendment is intended to affect the rule set forth in *Luce* and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment." App. at A-10 (citation omitted). The Advisory Committee's conscious choice not to propose a codification of *Luce* could be interpreted as a determination that the ramifications of the decision should be open to future consideration. Again, such consideration, if appropriate, can await another day as this case is distinct from *Luce*.

it is appropriate to look to the Advisory Committee's Notes to determine legislative intent. *See Beech Aircraft Corp.*, 488 U.S. at 165 n.9; *but see Tome*, 513 U.S. at 167-68 (Scalia, J., concurring). The Notes explain that the amendment "removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to 'remove the sting' of the impeachment." Fed. R. Evid. 609 Advisory Committee's Note.[10] This commentary confirms what has already been argued; the principle behind Rule 609 is to allow parties to feel free to attempt to mitigate the "sting" of Rule 609 evidence. Such freedom, of course, does not exist if an attempt to mitigate the "sting" comes at the high price of abandoning the right to appeal an adverse Rule 609 ruling.

[10] In originally including the cross-examination limitation, Congress did not intend to alter the common law by prohibiting attempts to mitigate the "sting." Rather, the legislative history reveals that the purpose of the language was "to make clear that evidence of a prior conviction is not admissible if a person does not testify." *United States v. Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir. 1976) (reviewing the legislative history of the original enactment of Rule 609). In other words, "[i]t seems clear from the legislative history that on direct examination, a party [could] elicit the evidence of prior conviction from his own witness[,]" *id.*, even under the old version of Rule 609. Thus, the 1990 amendment did not change the law in this regard but rather merely clarified that Rule 609 authorizes attempts to mitigate the "sting."

The Advisory Committee's Notes that correspond to the 1990 amendment also emphasize that Rule 609 evidence is particularly prejudicial to criminal defendants, and therefore the rule provides for a "special" test to determine whether they can be impeached with a prior conviction. *Id.*[11] Because the notes specifically recognize the inherent dangers of the use of Rule 609 evidence to impeach testifying criminal defendants, it follows that criminal defendants should not be penalized for attempting to mitigate the "sting" of such concededly harmful evidence.

In sum, under the prevailing common-law approach, a party did not abandon the right to appeal by attempting to mitigate the "sting" of an adverse ruling. Given that the legislative history demonstrates that Congress sought to maintain this common-law rule and that this rule furthers all relevant legislative concerns, the burden of showing otherwise cannot be met. *See Green*, 490 U.S. at 521.

3. Policy Considerations

Although, given the above analysis, the Court need not resort to policy considerations, such considerations also support a no-abandonment interpretation. The Rules specifically state that they "shall be construed to secure fairness in administration, elimination of unjustifiable

[11] The extensive legislative history of the original enactment of Rule 609 also reflects this concern. *See Green*, 490 U.S. at 512-24 (providing a detailed account of the legislative history of the original enactment of Rule 609).

expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. When considering the "general approach" of the Rules, *see Beech Aircraft Corp.*, 488 U.S. at 168-69, as set forth in Rule 102, almost all relevant policy considerations weigh in favor of a no-abandonment interpretation.

Rule 102's first consideration is that the Rules "be construed to secure fairness in administration." When considering the concept of "fairness" under the Rules (albeit in the context of Rule 403, not Rule 102), the Court has specifically recognized that, when it comes to presenting evidence to a jury, a "party seemingly responsible for cloaking something has reason for apprehension . . . ." *Old Chief*, 519 U.S. at 189. An abandonment interpretation certainly makes a defendant seem responsible for cloaking something, as it unfairly requires the defendant not to mention her prior conviction during her testimony in order to preserve an appeal, and such silence "may be viewed by the jury as concealment of relevant facts." 1 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* at 37 (7th ed. 1998). If a defendant chooses not to introduce evidence of the prior conviction during her direct examination, such a perceived "hide-the-ball" strategy may undermine the integrity of both the defendant and her counsel before the jury. *Id.*

The magnitude of this problem is compounded by the fact that Rule 609 evidence is designed to show that a defendant is untruthful. Thus, under an abandonment interpretation, not only does a defendant have to suffer an attack on her credibility by the Rule 609 evidence

itself, but, in order to maintain an appeal, she must also suffer the appearance that she attempted to hide the very evidence that shows she should not be believed. This is exactly the type of unfairness that should not be tolerated. In short, Rule 102's first consideration, fairness, supports a no-abandonment interpretation.

Rule 102's second consideration is the avoidance of "unjustifiable expense and delay." The goal, then, is to have one trial, not multiple ones, in which the parties, the judge, and the jury all give their best efforts to reach a true and just result. The Court has certainly agreed with this principle, as it has emphasized that a "trial on the merits [is] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be [a] determinative" hearing. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). In other words, the goal is for the parties "to put their best foot forward" to attempt to win at trial, as opposed to focusing on potential victory at some later stage in litigation after more expense and delay has resulted.

Given this basic, universal principle, the merits of a no-abandonment interpretation certainly are superior to an abandonment approach. Simply put, a no-abandonment interpretation encourages a defendant to try to win at trial. It encourages the defendant to put on her best case, by mitigating the "sting" of impeachment evidence, with the hope that a jury will believe her and vote to acquit. Under this approach, the defendant does not have to worry that, by presenting her best defense, she will be relinquishing a potentially meritorious issue on appeal. If the defendant who feels free to put on her best case wins at trial, "that will be the end of the case . . . ." *Sykes*, 433 U.S. at 89. The

truth will have been ascertained; there will be no appeal and therefore no more expense and delay.

An abandonment approach, on the other hand, discourages a defendant from "putting her best foot forward," as it forces her to choose between putting on her best case by mitigating the "sting" of impeachment evidence or presenting a lesser case to retain her right to appeal a potentially erroneous ruling if convicted. Such a rule simply generates wasted expense and delay. For example, the defendant who chooses not to put on her best case by declining to mitigate the "sting" may be convicted and therefore will file an appeal, whereas she may have been acquitted, thereby eliminating an appeal, if she had chosen otherwise. Similarly, a jury that would have acquitted a defendant who "put her best foot forward" may be unable to reach a verdict because the defendant chose otherwise; of course, such a result would require a retrial. In essence, one of the very real alternatives of an abandonment approach is that a defendant will choose not to put on her best case, a strategy explicitly discouraged by Rule 102 and the Court.

Rule 102's third and final consideration is the "growth and development of the law of evidence." Because the admission of a defendant's prior conviction under Rule 609 is one of the most potent weapons in a prosecutor's arsenal, the development of a firm body of appellate case law to guide lower courts in applying the rule is particularly important. Adoption of an abandonment approach, however, will seriously stunt the growth and development of Rule 609 case law, particularly in the criminal context. There are already numerous hurdles that must be overcome in order to obtain a definitive

appellate ruling on a Rule 609 issue. Under *Luce*, defendants must testify; they must also properly object under Rule 103, or be subject to a plain-error standard of review. Moreover, even if an objection is preserved, an appellate court may avoid reaching the merits of a Rule 609 issue by proceeding directly to a harmless-error analysis. Adding the significant hurdle that a defendant not attempt to mitigate the prior conviction's "sting" will further curtail the development of Rule 609 case law in the criminal context.

Such a regime entails unfortunate consequences. *See* 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 609.04[2][e], at 609-35 (2d ed. 1999) (noting negative ramifications if Rule 609 issues are rarely subjected to review). Indeed, this case provides an excellent example of how an abandonment interpretation limits the "growth and development" of Rule 609 case law. In this instance, the district court obviously was troubled by the Rule 609 issue and was uncertain as to the admissibility of petitioner's prior conviction. The district court's comments at the time of its ruling even seemed to ask for more concrete guidance from the Ninth Circuit. JA at 97. As a result of an abandonment interpretation, however, the district court has yet to receive any such guidance.

While all three of the policy considerations set forth in Rule 102 weigh in favor of a no-abandonment approach, one final policy consideration should be examined. In support of its holding in *Luce*, the Court reasoned that *"[w]hen a defendant does not testify*, the reviewing

court also has no way of knowing whether the Government would have sought to impeach with the prior conviction. If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction." *Luce*, 469 U.S. at 42 (emphasis added). This policy consideration, however, is inapplicable when a defendant testifies and attempts to mitigate the "sting" of the prior-conviction evidence.[12]

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[12] As a statement of the Court, *Luce*'s hypothetical example of a prosecutor declining to introduce Rule 609 evidence in order to eliminate an appellate issue should not be lightly disregarded, and therefore the text proceeds as if the hypothetical is valid. Petitioner, however, contends that the hypothetical is merely *dicta*, not the holding of the opinion, and therefore can and should be questioned. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 522 (1995) ("Whatever support it gave to the validity of those decisions was obiter dicta, and may properly be disregarded.").

Indeed, the Court's hypothetical suffers from a fundamental flaw in logic. If the hypothetical prosecutor believes that his case is so strong that he does not need to use the Rule 609 evidence, he should also realize that any error in admitting such evidence will not result in a reversal because it will be deemed harmless on appeal. *See* Fed. R. Crim. P. 52(a); Fed. R. Evid. 103. Therefore, the hypothetical prosecutor has no logical reason not to use the conviction. Perhaps because of this logical flaw, the Court's hypothetical appears to be just that, a hypothetical that does not correspond to the realities of criminal trial practice, as a prosecutor's focus is to put on his strongest case in an effort to win the "main event."

Of course, petitioner has referred to the "main event" language in *Sykes* because the Court's hypothetical also conflicts with the principle established in that opinion. The Court should not treat prosecutors differently from other parties; rather, treating prosecutors like other parties by encouraging them to

While a reviewing court may have "no way of knowing" whether a prosecutor would have used Rule 609 evidence "when a defendant does not testify," it certainly has a way of knowing when a defendant does testify because it can examine the defendant's testimony to determine whether "the Government's case [was] strong." *Luce*, 469 U.S. at 42. If a defendant's testimony established a plausible defense, thereby diminishing the strength of the government's case, a reviewing court can reasonably determine that the prosecutor would have used the prior conviction for impeachment purposes. Of course, a reviewing court may not be absolutely certain as to what a prosecutor would have done if a defendant did not attempt to mitigate the "sting," but reviewing courts regularly make similar determinations. For example, when a reviewing court conducts harmless-error analysis, it does not know with certainty what a jury would have done if it did not consider a piece of improperly-admitted evidence. Yet, on a daily basis, reviewing courts examine the record as a whole and make such educated findings. A reviewing court can make the same educated finding as to what a prosecutor would

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present their best case at trial will ultimately result in less expense and delay. A prosecutor who decides not to present his best case by foregoing Rule 609 evidence may, as parties sometimes do, overestimate the strength of his case. As a result, a jury could be unable to reach a verdict, which would then require a retrial. Had the prosecutor presented his best case and introduced the prior-conviction evidence, he may have obtained a guilty verdict. The Court should not encourage risking hung juries, or otherwise unsound jury verdicts, to avoid one appellate issue.

have done based on a full and complete record which includes the defendant's testimony.

Indeed, making such a finding is much easier than conducting a harmless-error analysis. Usually, in conducting harmless-error analysis, a reviewing court knows very little about what a jury was thinking other than its one-word verdict – "guilty." In the case of a prosecutor, however, there usually is much more evidence of his thought processes, such as his written filings and oral arguments to the district court. This case is an excellent example. Here, the government affirmatively moved to admit petitioner's prior conviction under Rule 609. A reviewing court could reasonably determine that a prosecutor would not file such a motion unless it was his clear intent to use the prior conviction. Moreover, a reviewing court could certainly make such a determination when, as here, the prosecutor files such a motion, states that the prior-conviction evidence is "important and critical" to his case, and never once mentions that he may opt not to use the conviction if his motion is granted.

Finally, even if the Court somehow determines that *Luce*'s policy concern is equally applicable in this context, it still should not take the drastic step of adopting an abandonment interpretation, as this one concern certainly does not outweigh all of the other policy considerations. Furthermore, this one concern can easily be allayed without the drastic solution of adopting an abandonment approach. If, for example, a prosecutor is uncertain as to whether he is going to introduce a Rule 609 conviction, he can easily alleviate this concern by articulating his uncertainty. In such a case, a district court can then give the prosecutor until the conclusion of the defendant's direct

examination, if he needs that much time, to make a decision.[13] At that point, if a prosecutor decides that he is going to use the conviction, the defendant should be allowed to attempt to mitigate the "sting;" if the prosecutor decides otherwise, the conviction need not be mentioned. *See* Saltzburg, *supra*, at 37 (specifically articulating this practical alternative).

D. Conclusion

The above analysis demonstrates that the plain language and legislative history of Rules 103 and 609, as well as relevant policy considerations, support a no-abandonment interpretation. Because a defendant does not abandon the right to appeal under the circumstances, there can be no waiver. As a result, the Court should reverse with instructions to entertain the merits of petitioner's Rule 609 claim.

Furthermore, it is a cardinal principle of statutory construction, "repeatedly affirmed, that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's]

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[13] Petitioner suggests that it will be the rare case in which a prosecutor is uncertain about his intent to use Rule 609 evidence. Of course, while a prosecutor could always express doubts about his intentions in order to disorganize the defendant's testimony, he certainly should be candid with the district court. Moreover, it is probably to a prosecutor's advantage to make his decision early on, as a district court may be less inclined to admit the prior conviction if the prosecutor is hesitant about its overall value.

duty is to adopt the latter.' " *Jones v. United States*, 119 S. Ct. 1215, 1222 (1999) (citation omitted). As argued below, an interpretation of Rules 103 and 609 which requires a defendant to remain silent about a prior conviction on direct examination in order to appeal the propriety of its admission unconstitutionally interferes with the right to testify. Accordingly, the Court's duty is to adopt a no-abandonment interpretation so as to avoid the grave constitutional problems articulated below.

II.

AN ABANDONMENT INTERPRETATION IS UNCONSTITUTIONAL WHEN APPLIED TO A CRIMINAL DEFENDANT BECAUSE IT IMPERMISSIBLY INTERFERES WITH THE EXERCISE OF THE RIGHT TO TESTIFY.

A. The Right To Testify Is A Fundamental Constitutional Right.

Although the Court has long noted the importance of a criminal defendant's testimony in the truth-seeking process, *see, e.g., Ferguson v. Georgia*, 365 U.S. 570, 581 (1961), a right to testify was not firmly established as one of constitutional dimension when the Court rendered its 1984 decision in *Luce*. As a result, although the decision briefly mentions two cases involving a defendant's constitutional right to remain silent, *see Luce*, 469 U.S. at 42-43 (citing *Brooks v. Tennessee*, 406 U.S. 605 (1972) and *New Jersey v. Portash*, 440 U.S. 450 (1979)), it did not engage in any analysis of the constitutional right to testify.

Three years after *Luce*, however, the Court firmly established that the right of a criminally accused to testify is one of constitutional dimension. *See Rock v. Arkansas*, 483 U.S. 44 (1987). In *Rock*, the defendant challenged an Arkansas rule that *per se* excluded all hypnotically-refreshed testimony. The Court held that the Arkansas rule unconstitutionally interfered with the defendant's right to testify. *Id.* at 60. In doing so, the Court firmly established that the right to testify is rooted in three separate provisions of the Bill of Rights.

First, the Court found that the right of a criminal defendant to testify on her own behalf is "one of the rights that 'are essential to due process of law in a fair adversary system.' " *Id.* at 51 (citation omitted). Second, the Court stated that the right of a criminally accused to testify is grounded in the Compulsory Process Clause of the Sixth Amendment. *Id.* at 52. Third, the Court reasoned that the right of a criminal defendant to testify is a necessary corollary to the Fifth Amendment guarantee against compelled testimony. *Id.* at 52-53.

After determining that the right to testify is one of constitutional dimension, the Court concluded by emphasizing that "the right to testify on one's own behalf in defense to a criminal charge is a *fundamental* constitutional right." *Id.* at 53 n.10 (emphasis added); *see, e.g., United States v. Teague*, 953 F.2d 1525, 1531-32 (11th Cir. 1992) (*en banc*) (emphasizing that right to testify is a *fundamental* constitutional right).

B. An Abandonment Rule Unconstitutionally Interferes With The Right To Testify.

Although the evidentiary rule at issue in *Rock* did not completely deprive the defendant of the right to take the witness stand, the Court nonetheless held that the rule's exclusion of hypnotically-refreshed evidence, on a *per se* basis, unconstitutionally interfered with her right to testify. Similarly, in this case, petitioner acknowledges that an abandonment rule does not completely deny a criminal defendant of the opportunity to present full and complete testimony. Such a rule, however, "does interfere[ ] with the ability of a defendant to offer [such] testimony[,]" *Rock*, 483 U.S. at 53, as it allows a defendant to give complete testimony on direct examination only if she is willing to abandon her right to appeal the admission of one of the most damaging pieces of evidence at trial. The exaction of this price constitutes an interference of constitutional dimension. *See Brooks*, 406 U.S. at 610-11 (finding state statute that required defendant to testify first to be unconstitutional because it "exact[ed] a price for" the exercise of a constitutional right and "cast a heavy burden on a defendant's otherwise unconditional right"); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."). An abandonment "rule, in other words, 'cuts down on the [right to testify] by making its assertion costly.' " *Brooks*, 406 U.S. at 611 (citation omitted).

Of course, the fact that an abandonment rule interferes with a defendant's right to testify does not necessarily mean that it is unconstitutional. As *Rock* made

clear, the right to testify "is not without limitation. The right to testify in one's own defense 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " *Rock*, 483 U.S. at 55 (citation omitted). In order to determine whether an evidentiary rule, like an abandonment rule, unconstitutionally interferes with the right to testify, the Court considers a two-pronged test: (1) whether the rule is arbitrary; *or* (2) whether the interference with the right to testify is disproportionate to the purposes it is designed to serve. *Rock*, 483 U.S. at 55-56; *see Williams v. Lord*, 996 F.2d 1481, 1484 (2d Cir. 1993) (Cardamone, J., concurring) (characterizing the test as a disjunctive one). An abandonment rule cannot withstand scrutiny under either prong of the test and therefore is unconstitutional.

1. Arbitrariness

In *Rock*, the Court found that an evidentiary rule which placed a *per se* ban on the admission of hypnotically-refreshed testimony was arbitrary and therefore unconstitutional. *Id.* at 61. Like the rule in *Rock*, an abandonment rule operates in a *per se* manner, as it applies irrespective of whether the justification supporting such a rule exists in a given case. For example, an abandonment rule requires a defendant to relinquish her right to appeal an adverse Rule 609 ruling if she attempts to mitigate the "sting" of her prior conviction even when the prosecutor clearly intended to use the prior-conviction evidence. In such a situation, there would appear to be no justification

supporting abandonment of the right to appeal. Put simply, the *per se* nature of the rule, like the *per se* evidentiary rule in *Rock*, renders it unconstitutional because it arbitrarily interferes with the fundamental constitutional right to testify.

2. Disproportionality

The second prong of the *Rock* test asks whether the evidentiary rule is "disproportionate to the purpose[it is] designed to serve." *Id.* at 56. Because the Court struck down the rule in *Rock* for arbitrariness, it did not fully explain how the balancing test set forth in the second prong should be applied. The Court did, however, indicate that "[i]n applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* at 56.[14]

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[14] The precise balancing test is not entirely clear. *See Stephens v. Miller*, 13 F.3d 998, 1004 (7th Cir. 1994) (*en banc*) (Flaum, J., concurring) ("[W]hen one examines the relevant Supreme Court authority mandating a balancing test, one must conclude that the Court has yet to formulate a clear standard for determining when a governmental interest is sufficiently important to outweigh the accused's interest in presenting relevant testimony."). In *United States v. Scheffer*, 118 S. Ct. 1261 (1998), Justice Thomas's lead opinion does state that a statute will be found to be unconstitutionally "disproportionate only where it has infringed upon a weighty interest of the accused." *Id.* at 1264. It is not clear, however, whether this portion of the opinion commanded a majority of the Court. One could argue that because the right to testify is a *fundamental* constitutional right, *see, e.g., Rock*, 483 U.S. at 53 n.10; *Teague*, 953 F.2d at 1531-32, a strict-scrutiny test should apply. *See, e.g., Kadrmas v.*

The only possible interest served by an abandonment rule is the one articulated in *Luce* – that is, allowing the government to withhold its decision as to whether to introduce the conviction until the last possible moment in order to avoid an appellate issue. *See Luce*, 469 U.S. at 42. This interest certainly does not compare to the weighty interests involved in other evidentiary rules that have withstood constitutional attack. *See, e.g., Stephens*, 13 F.3d at 1001-02 (noting "valid legislative determination that victims of rape . . . deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy" in rejecting attack on state rape shield statute). On the other hand, under an abandonment rule, a defendant will suffer one of two serious consequences; she will either (1) appear as if she is hiding something from the jury, or (2) be unable to pursue her objection to the admission of critical evidence on appeal. These two serious consequences certainly outweigh the minimal interest in allowing a prosecutor to choose whether to introduce Rule 609 evidence at the last possible moment. As a result, an abandonment rule is also unconstitutional under the second prong of the *Rock* test.

Dickinson Pub. Schs., 487 U.S. 450, 458 (1988). In other words, the evidentiary rule must "advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). Applying this standard, an abandonment rule certainly would not pass constitutional muster.

C. Conclusion

Even if the Rules incorporate an abandonment rule, such a rule is unconstitutional when applied to a criminal defendant. As a result, the Court should reverse and remand with instructions to entertain the merits of petitioner's Rule 609 claim.

III.

EVEN UNDER AN ABANDONMENT RULE, WAIVER CANNOT APPLY IN THIS CASE BECAUSE THERE HAS BEEN NO FINDING THAT THE ABANDONMENT OF THE RIGHT TO APPEAL WAS KNOWING AND INTENTIONAL.

Even if the Court finds that the Rules constitutionally provide that a criminal defendant abandons the right to appeal an adverse Rule 609 ruling by attempting to mitigate the "sting," that does not mean that a waiver automatically occurs every time a defendant does so. A "waiver is the '*intentional* relinquishment or abandonment of a *known* right.' " *Olano*, 507 U.S. at 733 (emphases added) (citation omitted). Thus, only an intentional and knowing abandonment ripens into a waiver.

Furthermore, "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 U.S. at 733. The Ninth Circuit did not analyze any of these factors; instead, it applied an automatic waiver rule. In other words, it never made any determination as to whether the abandonment of the

right to appeal was knowing and intentional and thereby ripened into a valid waiver. As a result, if the Court adopts an abandonment interpretation of the Rules, it should at least remand to the Ninth Circuit for consideration of the factors outlined in *Olano* and a determination as to whether the abandonment of the right to appeal was knowing and intentional.[15]

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[15] The Court has stated that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, *testify in his or her own behalf, or take an appeal.*" *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (emphasis added). Thus, under *Olano*, the Ninth Circuit may have to determine whether petitioner had to participate personally in the waiver and whether certain procedures should have been employed to ensure that an informed choice was made. The practical problems inherent in making such determinations, and their potential for micro-managing district court proceedings, are simply another policy reason in support of a no-abandonment interpretation of the Rules. *Cf. Kumho Tire Co., Ltd.*, 119 S. Ct. at 1174 (rejecting interpretation of rule that "would prove difficult, if not impossible, for judges to administer").

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court reverse the decision of the Ninth Circuit and remand with instructions to entertain the merits of her Rule 609 claim. In the alternative, petitioner respectfully requests that the Court reverse the decision of the Ninth Circuit and remand with instructions to make a finding as to whether there was a knowing and intentional abandonment of the right to appeal the Rule 609 ruling.

Respectfully submitted,

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APPENDIX

1. **U.S. Const. Amend. V**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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2. **U.S. Const. Amend. VI**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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3. **Rule 102. Purpose and Construction**

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

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4. **Rule 103. Rulings on Evidence**

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of the offer in question and answer form.

(c) Hearing of the jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

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5. **Rule 609. Impeachment by Evidence of Conviction of Crime**

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date

of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary

for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

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6. **Proposed Amendment and Notes to Fed. R. Evid. 103**

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in

which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of the jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

COMMITTEE NOTE

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called *"in limine"* rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling,

(2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat*, 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Another court, aware of this Committee's proposed amendment, has adopted its approach. *Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999) (en banc). Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. *See* Fed. R. Civ. P. 46 (formal exceptions unnecessary); Fed. R. Cr. P. 51 (same); *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary."). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g.,*

United States v. Vest, 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti*, 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. *See, e.g., Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d Cir. 1997) (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the

court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk*, 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. *See Old Chief v. United States*, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See Huddleston v. United States*, 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

Nothing in the amendment is intended to affect the provisions of Fed. R. Civ. P. 72(a) or 28 U.S.C. § 636(b)(1)

pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed. R. Civ. P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. § 636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4th Cir. 1997) ("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When Fed. R. Civ. P. 72(a) or 28 U.S.C. § 636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other situations. *See United States v.*

DiMatteo, 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman*, 41 F.3d 785, 788 (1st Cir. 1994) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria*, 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct

examination); *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine is* sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas*, 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

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In the Supreme Court of the United States

MARIA SUZUKI OHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a federal criminal defendant waives an objection to the admission of a prior conviction as impeachment evidence under Rule 609(a)(1) of the Federal Rules of Evidence when the defendant introduces the conviction on direct examination to "remove the sting" of its anticipated prejudicial effect.

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In the Supreme Court of the United States

No. 98-9828

MARIA SUZUKI OHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 146-155) is reported at 169 F.3d 1200.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1999. The petition for a writ of certiorari was filed on June 7, 1999, and granted on October 18, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Rule 609(a) of the Federal Rules of Evidence provides:

> **General rule.** For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of importing marijuana, in violation of 21 U.S.C. 952 and 960, and one count of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 30 months' imprisonment to be followed by three years' supervised release. J.A. 140-141. The court of appeals affirmed. J.A. 147.

1. On July 29, 1997, petitioner attempted to enter the United States from Mexico through the port of entry at San Ysidro, California. Petitioner was the driver and sole occupant of a 1984 GMC van, which was later found to be registered in her name. A customs inspector noticed that someone had tampered with one of the van's interior panels. A search of the van uncovered more than 80 pounds of marijuana. Petitioner was arrested and subsequently indicted for importation of marijuana and possession of marijuana with intent to distribute it. J.A. 147; 1/29/98 Tr. 79.

The government filed motions in limine asking the district court to admit petitioner's 1993 felony conviction for possession of methamphetamine as impeachment evidence under Federal Rule of Evidence 609(a)(1) and as substantive evidence under Federal Rule of Evidence 404(b). J.A. 13-21.[1] At a pretrial hearing on January 26, 1998, the court denied the motion to admit the conviction under Rule 404(b). J.A. 56. The court reserved ruling on the motion to admit the conviction under Rule 609(a)(1). J.A. 67-68. A short time later during the hearing, in ruling on another motion in limine, the court advised counsel of the tentative nature of its in limine rulings, instructing that "[y]ou can always revisit the issue." J.A. 72. The court added that "[n]o ruling I make is with prejudice; I always keep an open mind." *Ibid.*

On the morning of January 28, 1998, before the jury was selected, the district court heard further arguments on the Rule 609 issue, J.A. 90-97, and then ruled in limine that, if petitioner testified at trial, the government could use her prior conviction to impeach her, J.A. 97-98. The court concluded that the probative value of the conviction outweighed any prejudice to petitioner from its admission. *Ibid.*

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[1] Rule 609(a)(1) provides, in relevant part, that "evidence that an accused has been convicted of * * * a crime [punishable by death or imprisonment in excess of one year] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Fed. R. Evid. 609(a)(1). Rule 404(b) provides, in relevant part, that "[e]vidence of other crimes," although "not admissible to prove the character of a person in order to show action in conformity therewith," may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b).

On January 29, 1998, the government presented its case-in-chief, which consisted of the testimony of four witnesses. 1/29/98 Tr. 8-136. After presenting one witness, petitioner testified in her own defense.

On direct examination, after answering a few background questions elicited by defense counsel, petitioner testified that she had been convicted of possession of methamphetamine in 1993. J.A. 104-105. She then testified about the events charged in the indictment in this case. She denied any knowledge of the marijuana discovered in the van. J.A. 123. She claimed that the van had been taken to Mexico without her permission and that she had gone to Mexico simply to retrieve the van. J.A. 114-120. She raised no objection, either before or during her testimony, to the admission of her prior conviction.

On cross-examination, the prosecutor asked petitioner whether her prior conviction was for a felony, and petitioner responded that it was. J.A. 135. On redirect examination, petitioner explained that the conviction was for possession of "a personal use quantity" of methamphetamine rather than "a distribution quantity." J.A. 136.

On February 1, 1998, the jury found petitioner guilty on both counts of the indictment. The district court entered a judgment of conviction in accordance with the jury's verdict. J.A. 140-145.

2. The court of appeals affirmed petitioner's conviction. J.A. 146-155. Petitioner argued on appeal that the district court abused its discretion in granting the government's in limine motion to admit evidence of her prior felony conviction under Rule 609(a)(1). The court of appeals declined to reach that argument. Relying on circuit precedent, the court held that "when a criminal defendant introduces evidence of his prior conviction

during his direct examination, the criminal defendant waives the right to appeal the district court's in limine ruling that the prior conviction was admissible under Rule 609(a)(1)." J.A. 148-149 (citing, *inter alia*, *United States* v. *Williams*, 939 F.2d 721, 725 (9th Cir. 1991)).

The court of appeals rejected petitioner's argument that its waiver rule was undermined by a 1990 amendment to Rule 609(a)(1), which clarified that a criminal defendant's prior convictions may be elicited on direct examination as well as on cross-examination. (The rule had previously referred only to cross-examination.) The court explained that criminal defendants in the Ninth Circuit, as in most other circuits, were permitted to testify about prior convictions on direct examination even before the 1990 amendment. The court perceived nothing inconsistent between allowing a defendant to introduce his prior convictions on direct examination to attempt to "remove the sting" and precluding a defendant who does so from appealing an in limine ruling on the admissibility of the convictions as impeachment evidence. J.A. 152-153.

SUMMARY OF ARGUMENT

In *Luce* v. *United States*, 469 U.S. 38 (1984), this Court held that a criminal defendant cannot challenge on appeal an in limine ruling on the admissibility of a prior conviction as impeachment evidence under Federal Rule of Evidence 609(a)(1) if the defendant does not testify at trial. The Court reasoned that an in limine ruling under Rule 609(a)(1) is necessarily tentative because, in order to perform the requisite balancing of the probative value of the conviction against its prejudicial effect, a court "must know the precise nature of the defendant's testimony" at trial. 469 U.S. at 41. Accordingly, because a court's in limine ruling

under Rule 609(a)(1) "is subject to change when the case unfolds" and because a prosecutor might elect at trial "not to use an arguably inadmissible prior conviction," the Court concluded that "[a]ny possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative." *Id.* at 42-41.

Here, in contrast to *Luce*, petitioner chose to testify at trial. But petitioner's tactical decision to introduce her prior conviction on direct examination had the same preemptive effect on the district court's and the government's prerogatives and thereby rendered any possible harm flowing from the in limine ruling "wholly speculative." The district court was denied the opportunity to revisit its in limine ruling on the admissibility of petitioner's conviction in light of the evidence at trial. And the government was denied the opportunity to elect not to impeach petitioner with the conviction in order to avoid an issue for appeal. Petitioner should therefore be foreclosed, as was the defendant in *Luce*, from challenging the in limine ruling on appeal.

Nothing in the text, legislative history, or purposes of the Federal Rules of Evidence is inconsistent with a holding that a criminal defendant waives an objection to the admission of a prior conviction by testifying to the conviction on direct examination. The Federal Rules of Evidence are silent on the applicability of waiver principles in the circumstances presented here. This Court has recognized that waiver, including waiver of evidentiary objections, is presumptively available absent an express prohibition. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-203 (1995). The waiver rule applied in this case serves Congress's intent that the Rules of Evidence be construed to

promote fairness and judicial economy. It prevents a defendant from planting irremediable errors in his trial during direct examination. It also affords the district court and the government the opportunity, in the context of trial, to avoid the introduction of arguably inadmissible evidence, thereby protecting against unnecessary appeals, reversals, and retrials.

Nor does the waiver rule impose an unconstitutional burden, as defined by this Court, on a criminal defendant's right to testify in his own defense. The waiver rule serves "legitimate interests" of finality and judicial economy and is not "arbitrary" or "disproportionate" to those interests. *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 (1987). Indeed, the waiver rule does not meaningfully restrict a defendant's right to testify in any way. At most, the waiver rule may complicate a defendant's choice about when to testify about a single peripheral issue—a choice that "is indistinguishable from any of a number of difficult choices that criminal defendants face every day." *Mezzanatto*, 513 U.S. at 209.

ARGUMENT

A CRIMINAL DEFENDANT CANNOT APPEAL AN IN LIMINE RULING ON THE ADMISSIBILITY OF A PRIOR CONVICTION AS IMPEACHMENT EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 609(a)(1) IF THE DEFENDANT INTRODUCES THE PRIOR CONVICTION DURING HIS DIRECT EXAMINATION

A. A Defendant Waives An Objection To An In Limine Ruling Under Rule 609(a)(1) By Testifying To His Prior Conviction On Direct Examination

Federal Rule of Evidence 609(a)(1) provides that evidence of an accused's prior felony convictions "shall be admitted" for the purpose of attacking his credibility

if the district court determines that "the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Fed. R. Evid. 609(a)(1). Rule 609 was enacted against the backdrop of the common law, which originally held that persons with felony convictions were not competent to testify. *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989). The common law evolved into an evidentiary rule allowing such persons to testify but admitting all felony convictions for impeachment purposes "without exercise of judicial discretion." *Id.* at 511-512, 521. In enacting Rule 609(a)(1), Congress explicitly "circumscrib[ed] the common-law rule" by requiring district courts to admit evidence of a prior felony conviction only if its probative value outweighs its prejudicial effect. *Id.* at 522.[2]

This case, like *Luce* v. *United States*, 469 U.S. 38 (1984), concerns whether a criminal defendant may challenge on appeal a district court's in limine ruling on the admissibility of a prior conviction under Rule 609(a)(1). Although not explicitly authorized by the Federal Rules of Evidence, the practice of entertaining motions in limine "developed pursuant to the district court's inherent authority to manage the course of trials." *Id.* at 41 n.4.[3] The in limine procedure serves to

[2] No such balancing is called for if the prior conviction was for a crime that "involved dishonesty or false statement, regardless of the punishment." Fed. R. Evid. 609(a)(2).

[3] In limine means "[o]n or at the threshold; at the very beginning; preliminarily." *Black's Law Dictionary* 708 (5th ed. 1979). An in limine motion refers to any motion, "whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce*, 469 U.S. at 40 n.2. Motions in limine were not recognized at common law and "encountered opposition in the courts" when first introduced. *Gendron* v. *Pawtucket Mut. Ins. Co.*, 409 A.2d 656, 659 (Me. 1979) (approving use of motion in limine).

give the parties a preliminary indication of how the court will decide an evidentiary question should the evidence actually be offered at trial. A defendant has no right to such an advance ruling; a court may opt instead to make a decision only after the facts have developed at trial.[4] When a court issues an in limine ruling, the parties may take it into account as one factor in planning their trial strategy. But an in limine ruling may remain "subject to change as the case unfolds," *id.* at 41, especially where the issue requires a balancing of probative value against prejudicial effect. The issue also may become moot if the evidence is not introduced despite an in limine ruling in favor of its admissibility.

1. In *Luce*, this Court considered whether, after a district court ruled in limine that the government could impeach the defendant with a prior conviction if he testified at trial, the defendant could refrain from testifying, and thus avoid impeachment with the conviction, but still could challenge the in limine ruling on appeal. The Court held that, in order to preserve for review a challenge to an in limine ruling allowing the use of a prior conviction for impeachment purposes under Rule 609(a)(1), a defendant must testify at trial. 469 U.S. at 43.

The Court's holding rested largely on its conclusion that in limine rulings under Rule 609(a)(1) are not

[4] See, *e.g.*, *United States* v. *Martinez*, 76 F.3d 1145, 1152 (10th Cir. 1996); *United States* v. *Witschner*, 624 F.2d 840, 844 (8th Cir.), cert. denied, 449 U.S. 994 (1980); *United States* v. *Evanchik*, 413 F.2d 950, 953 (2d Cir. 1969); see generally *Huddleston* v. *United States*, 485 U.S. 681, 690 (1988) ("The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial.").

definitive rulings on admissibility. The Court explained that the district court "must know the precise nature of the defendant's testimony" in order to balance the probative value of a prior conviction as impeachment evidence against its prejudicial effect. *Luce*, 469 U.S. at 41. And that cannot be known until the defendant actually testifies. A defendant's proffer of his proposed testimony cannot suffice because "his trial testimony could, for any number of reasons, differ from the proffer." *Id.* at 41 n.5. A district court's in limine ruling on the admissibility of a prior conviction under Rule 609(a)(1) consequently "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer." *Id.* at 41. "Indeed," the Court said, "even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling." *Id.* at 41-42.

The Court thus concluded that "[a]ny possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative," *Luce*, 469 U.S. at 41, because the court always could, and in some instances should, reconsider the ruling based on the evidence presented at trial. The Court also identified another reason why the impact of an in limine ruling permitting the government to impeach a defendant with a prior conviction is speculative: Even if the district court did not alter its in limine ruling in light of the evidence at trial, the government still might choose not to introduce the conviction in order to avoid a close question on appeal. *Id.* at 42. "If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means,"

the Court explained, "a prosecutor might elect not to use an arguably inadmissible prior conviction." *Ibid.*[5]

2. As the Court's decision in *Luce* teaches, an in limine ruling on the admissibility of a prior conviction under Rule 609(a)(1) is necessarily tentative, because the district court cannot definitively balance the probative value of the conviction as impeachment evidence against its prejudicial effect on the defendant in advance of trial.[6] That is because the balancing required by Rule 609(a)(1) turns on factors that become concrete only during the course of trial. Those factors include the strength of the government's case-in-chief, the similarity between the past crime and the charged crime, the defendant's actual testimony on direct examination, the extent to which the case turns on the

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[5] The Court also noted that, "[e]ven if these difficulties could be surmounted," the defendant's failure to testify would preclude harmless error analysis, while a requirement that the defendant testify would enable a reviewing court to determine the impact of any error in admitting impeachment evidence and would discourage motions simply to "plant" claims of reversible error in the record. *Luce*, 469 U.S. at 42.

[6] Notwithstanding petitioner's assertion to the contrary, the in limine ruling in this case was less than definitive. Before trial, while discussing another in limine ruling, the district court specifically instructed counsel that none of its rulings was made with prejudice and that the court always kept an "open mind." 1/26/98 Tr. 35. See *Walden* v. *Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d Cir. 1997) (district court's in limine ruling was non- definitive where, "[a]lthough the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative"), cert. denied, 523 U.S. 1074 (1998).

defendant's credibility, and the other impeachment evidence available to the government.[7]

Thus, "to perform th[e] balancing [required by Rule 609(a)(1)], the court must know the precise nature of the defendant's testimony," *Luce*, 469 U.S. at 41, as well as the other evidence at trial that preceded that testimony. See *United States* v. *Williams*, 939 F.2d 721, 724-725 (9th Cir. 1991) ("the admissibility of a prior conviction for impeachment depends to a great extent on the nature of the defendant's testimony," because "it is often difficult to determine in advance of this testimony whether the use of such a powerful form of impeachment is justified"); see also *United States* v. *Mejia-Alarcon*, 995 F.2d 982, 987 n.2 (10th Cir.) (recognizing that a definitive balancing of the probative value of a conviction against its prejudicial effect can "only properly be performed after an assessment of the evidence that had come in up to the point of its admission"), cert. denied, 510 U.S. 927 (1993); *United States* v. *Cook*, 608 F.2d 1175, 1190 (9th Cir. 1979) (Kennedy, J., concurring in part and dissenting in part) ("after the defendant has testified on direct * * * is the time at which the probative value of the conviction

[7] See, *e.g.*, *United States* v. *Browne*, 829 F.2d 760, 762-763 (9th Cir. 1987) (the factors that a court should consider in determining the admissibility of a prior conviction under Rule 609(a)(1) include "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and, (5) the centrality of the defendant's credibility"), cert. denied, 485 U.S. 991 (1988); accord, *e.g.*, *United States* v. *Pritchard*, 973 F.2d 905, 908-909 (11th Cir. 1992); *United States* v. *Sloman*, 909 F.2d 176, 181 (6th Cir. 1990); *Gordon*, v. *United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.), cert. denied, 390 U.S. 1029 (1968).

can be balanced against its prejudicial effect with the most care and precision"), cert. denied, 444 U.S. 1034 (1980).[8]

The inherently tentative nature of in limine rulings is reflected in the general rule that, to preserve for appeal a challenge to the introduction of evidence that was ruled admissible before trial, a party must make a contemporaneous objection at trial. See *Clausen* v. *Sea-3, Inc.*, 21 F.3d 1181, 1190 (1st Cir. 1994) (observing that the contemporaneous-objection rule rests on the understanding that in limine rulings are "frequently made in the abstract") (quoting *Collins* v. *Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980)); see also, *e.g.*, *United States* v. *Birbal*, 62 F.3d 456, 465 (2d Cir. 1995), cert. denied, 522 U.S. 976 (1997); *McEwen* v. *City of Norman*, 926 F.2d 1539, 1544 (10th Cir. 1991); 1 Jack B. Weinstein, *Weinstein's Federal Evidence* § 103.11[2][b], at 103-16 (1997 ed.) ("If a party has raised an objection before trial by means of a motion in limine that the court has denied, most courts hold that the objection must be renewed at trial for the objection to be preserved for appeal.").[9] Even those courts that have

[8] See also, *e.g.*, *United States* v. *Cobb*, 588 F.2d 607, 612 (8th Cir. 1978) ("any final ruling on the admissibility [under Rule 609(b)] of a more than ten-year-old conviction should rest upon 'specific facts and circumstances' developed in the course of trial which bear on the probative value or prejudicial effect of the conviction"), cert. denied, 440 U.S. 947 (1979); see generally *Walden*, 126 F.3d at 518 n.10 ("[W]hen the evidence is challenged as irrelevant or prejudicial[,] the considerations weighed by the court will likely change as the trial progresses."); *Rosenfeld* v. *Basquiat*, 78 F.3d 84, 90 (2d Cir. 1996) ("Claims that relevant evidence is unduly prejudicial * * * must be resolved in the developed context of the trial.") (citing, *inter alia*, *Luce*, 469 U.S. at 43).

[9] See also, *e.g.*, *Hendrix* v. *Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1504 (11th Cir. 1985); *Hale* v. *Firestone Tire & Rubber*

allowed a party to appeal an adverse in limine ruling without renewing the objection at trial have done so only where the in limine ruling was "definitive" as opposed to preliminary or tentative. See, *e.g.*, *Wilson* v. *Williams*, 182 F.3d 562, 565-566 (7th Cir. 1999) (en banc); *Scott* v. *Ross*, 140 F.3d 1275, 1285 (9th Cir. 1998), cert. denied, 119 S. Ct. 1285 (1999); *Walden* v. *Georgia-Pacific Corp.*, 126 F.3d 506, 517 (3d Cir. 1997), cert. denied, 523 U.S. 1074 (1998).[10] A pretrial ruling on the admissibility of a prior conviction under Rule 609(a)(1) cannot be definitive for the reasons explained in *Luce*.

3. Whether or not an in limine ruling allowing a defendant's impeachment with a prior conviction could ever be challenged on appeal absent a contemporaneous objection at trial, a defendant forecloses the right to appellate review by introducing the conviction on direct examination. A majority of the courts of appeals that have considered the issue since *Luce* have held that a party waives any challenge to the in limine ruling in such circumstances. See *United States* v. *Gaitan-Acevedo*, 148 F.3d 577, 592 (6th Cir.), cert. denied, 119 S. Ct. 256 (1998); *Gill* v. *Thomas*, 83 F.3d 537, 540-541 (1st Cir. 1996); *United States* v. *Smiley*, 997 F.2d 475, 480 (8th Cir. 1993); *Williams*, 939 F.2d at 724-725; cf. *United States* v. *Martinez*, 76 F.3d 1145, 1151 (10th Cir. 1996) (holding that the defendant waived his right to object to the admission of his prior convictions under Rule 609(a)(1), where the district court declined to rule on their admissibility until after the defendant testified, and the defendant acknowledged the convictions on direct examination to "draw the sting").[11]

Those courts have reasoned that a defendant's tactical decision to introduce his prior conviction on direct examination has the same consequences as the defendant's tactical decision in *Luce* to refrain from testifying. In both circumstances, the defendant deprives the district court of the opportunity to rule definitively on the admissibility of the prior conviction in light of the evidence at trial, including the defendant's own testimony on direct examination, and thereby to avoid a potential error that could jeopardize any verdict of guilt obtained in the case. And, in both circumstances, the defendant deprives the government of the opportunity to decide, in light of the evidence at trial, to refrain from introducing the conviction and thereby to avoid an appeal on the Rule 609(a)(1) issue and potentially a second trial. As the Ninth Circuit has explained:

> By bringing out the fact of the prior conviction during her direct examination of [the defendant],

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Co., 756 F.2d 1322, 1333 (8th Cir. 1985); 1 Michael H. Graham, *Handbook of Federal Evidence* § 103.8, at 50 (4th ed. 1996) ("To preserve error for appeal, counsel most often will be required to and thus to be safe should either renew the objection or make an offer of proof at trial.").

[10] A proposed amendment to Federal Rule of Evidence 103 would eliminate the contemporaneous objection requirement with respect to "definitive" in limine rulings. Pet. Br. App. A5. The proposed amendment has been approved by the Judicial Conference and is pending before this Court. 21 Charles A. Wright et al., *Federal Practice and Procedure* § 5031 (Supp. 2000) (available on Westlaw).

[11] But see *Wilson*, 182 F.3d at 566-567 (a party does not waive an objection to the admission of a prior conviction under Rule 609(a)(1) by introducing the conviction on direct examination); *United States* v. *Fisher*, 106 F.3d 622, 629-630 (5th Cir. 1997) (same). Cf. *Judd* v. *Rodman*, 105 F.3d 1339, 1342 (11th Cir. 1997) (holding that the plaintiff did not waive her objection to the trial court's in limine ruling admitting evidence of prior sexual history by introducing the evidence at trial to "attempt to soften [its] blow").

> [defense counsel] deprived the court and the government of a last chance to reverse their prestated positions. Were we to sanction such a strategy, we would in effect be licensing defendants to plant irremediable errors in their trials during direct examination.

Williams, 939 F.2d at 725; accord *Gill*, 83 F.3d at 541.

The general rule that a defendant cannot both preserve an objection to a ruling admitting evidence and introduce the evidence himself to gain a tactical advantage—in essence, that he cannot eat his cake and have it, too—has been recognized in a variety of contexts both before and after the enactment of the Federal Rules of Evidence. See, *e.g.*, *United States* v. *Rosenthal*, 793 F.2d 1214, 1245 (11th Cir. 1986) ("[It] would circumvent our entire judicial system to allow one to elicit testimony at trial and later allow that person to complain of its admissibility on appeal."), cert. denied, 480 U.S. 919 (1987); *United States* v. *Mariani*, 539 F.2d 915, 921 (2d Cir. 1976) ("[W]here one who objects to a pretrial ruling himself introduces the evidence in order to present it in its most favorable light, and that evidence forms no significant part of his opponent's case, he cannot later be heard to complain that its admission constituted reversible error."); *United States* v. *Truitt*, 440 F.2d 1070, 1071 (5th Cir.) ("It is settled law that one waives his right to object to the admission of evidence if he later introduces evidence of the same or similar import himself."), cert. denied, 404 U.S. 847 (1971); *Weinstein's Federal Evidence*, *supra*, § 103.14, at 103-30 ("An attorney can waive a client's right to raise an error on appeal by deliberately eliciting inadmissible evidence."); cf. *United States* v. *Mezzanatto*, 513 U.S. 196, 203 (1995) (a

criminal defendant is "not entitled 'to evade the consequences of an unsuccessful tactical decision' made in welcoming admission of otherwise inadmissible evidence") (quoting *United States* v. *Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992)).

The waiver rule applied by the court of appeals in this case serves important societal interests in the fair and efficient administration of criminal justice. It assures that a district court and the government are afforded an opportunity, after exposure to the defendant's testimony and the other evidence at trial, to avoid a potential error that could jeopardize any conviction obtained in the case. It eliminates an incentive for defendants to "plant irremediable errors," *Williams*, 939 F.2d at 725, in their trials that could provide a basis for reversal. It spares the courts of appeals from having to review evidentiary rulings that were necessarily tentative because they were made before the district court heard any of the testimony offered at trial.

A contrary rule could deter district courts from making in limine rulings, and thus from providing the parties with valuable guidance about the probable resolution of evidentiary issues that may arise at trial, in order to preserve their own and the government's prerogative to change their minds in the context of trial. Such a result would operate to the disadvantage of criminal defendants, such as petitioner here, who would have to decide whether to testify without any indication of how evidentiary issues might be resolved. It could also cause significant inefficiency in the conduct of the trial. When an evidentiary issue, such as the admissibility of a conviction under Rule 609(a)(1), has been briefed and argued before trial on a motion in

limine, the court and the parties often need not tarry long over the issue when it arises during trial. Any further argument can typically be focused on why the actual evidence bearing on that issue is, or is not, consistent with the evidence anticipated before trial. In contrast, when the district court is confronted with the Rule 609(a)(1) issue for the first time at trial, a more extensive proceeding may be required. The jury may have to be excused for a prolonged period while the issue is debated and decided.

Although the waiver rule results in a defendant's having to choose between preserving a Rule 609(a)(1) objection for appeal and introducing the conviction on direct examination to "reduce the sting," defendants have to make similar tactical decisions throughout the course of a trial, including the more significant decision presented by *Luce* of whether to testify at all. See Part C, *infra* (explaining why putting a defendant to the choice presented here does not unconstitutionally burden his right to testify).[12]

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[12] At a minimum, a defendant should be required to offer the prior conviction only at the end of his direct examination after renewing his Rule 609 objection—a requirement that was not satisfied here because petitioner introduced her prior conviction at the beginning of her direct testimony without renewing her Rule 609 objection. Such a procedure would at least give the district court an opportunity to perform the Rule 609(a)(1) balancing in light of the defendant's direct testimony and would give the government an opportunity to decide at that time whether to seek to introduce the conviction. See 1 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* 37 (7th ed. 1998) (proposing such an approach). Even that rule, while preferable to allowing a defendant to rely on a pretrial ruling alone, nevertheless deprives the court and the government of the opportunity to act only after hearing the defendant's testimony on cross-examination.

B. Nothing In The Text, History, Or Purposes Of The Federal Rules Of Evidence Precludes The Application Of Waiver Principles When A Defendant Introduces A Prior Conviction On Direct Examination

Petitioner contends (Br. 14-40) that the waiver rule applied by the court of appeals in this case is contrary to the language, legislative history, and purposes of the Federal Rules of Evidence. She is mistaken.

1. Rule 103 Is Consistent With The Rule That A Defendant Waives An Objection To An In Limine Ruling On The Admissibility Of A Prior Conviction By Introducing The Conviction On Direct Examination

Petitioner asserts (Br. 18-21) that, because Federal Rule of Evidence 103 does not expressly authorize waiver of objections to the admissibility of evidence, Rule 103 prohibits such waiver. That is incorrect. Rule 103 is silent on whether, or in what circumstances, a party may waive an objection to the admission of evidence. This Court has held that evidentiary objections are presumptively waivable absent an express prohibition. *Mezzanatto*, 513 U.S. at 200-203; see generally *New York* v. *Hill*, No. 98-1299 (Jan. 11, 2000), slip op. 4 (noting that the Court has, "'in the context of a broad array of constitutional and statutory provisions,' articulated a general rule that presumes the availability of waiver") (quoting *Mezzanatto*, 513 U.S. at 200-201). Petitioner cites no authority to the contrary.[13]

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[13] Petitioner's position is further undermined by the Advisory Committee's Note to the proposed amendment to Rule 103 that would, among other things, eliminate the requirement that a party object at trial to the introduction of evidence that the court held to be admissible in a "definitive ruling * * * either at or before

Petitioner next argues (Br. 21) that a waiver rule would render Rule 103 "internally inconsistent," because a defendant who simply does not object at trial to the government's introduction of a prior conviction as impeachment evidence is entitled to plain error review, whereas a defendant who introduce the conviction himself is entitled to no review at all. But the two categories of defendants are not entitled to the same treatment. The defendant who testifies to a prior conviction on direct examination, in contrast to the defendant who merely fails to object when the government offers a prior conviction on cross-examination, "deprive[s] the court and the government of a last chance to reverse their pre-stated positions," and thereby to avoid any error in the admission of the conviction. *Williams*, 939 F.2d at 725; accord *Gill*, 83 F.3d at 541. It is thus appropriate to find a waiver of any claim of error in the admission of the conviction when the defendant himself introduces the conviction.

Petitioner further contends (Br. 25) that a waiver rule is contrary to the "prevailing common-law view" in 1975 when the Federal Rules of Evidence were enacted.[14] There was no generally accepted view in

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trial." Pet. Br. App. A5. The advisory committee's note explains that the proposed amendment "does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to 'remove the sting' of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling." *Id.* at A11. The statement indicates that the advisory committee does not perceive that the existing Rule 103 precludes waiver in such circumstances.

[14] Petitioner asserts (Br. 28) that the advisory committee's notes to Rule 103 "state that Rule 103(a) was meant to codify 'the law as generally accepted today.'" The statement on which petitioner relies, however, refers only to the proposition that "[r]ulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge." Fed. R. Evid. 103 advisory committee's note (subdiv. a). It does not refer to the entire body of law relating to appellate review of evidentiary rulings.

1975 as to whether a defendant preserved an objection to the admission of a prior conviction where, after the trial court ruled in limine that the conviction could be used as impeachment evidence, the defendant introduced the conviction himself on direct examination. The question had been addressed by very few courts as of that time.[15] Petitioner cites only two decisions that held that a defendant had not waived an objection by introducing a prior conviction himself—both of which decisions date from shortly before the enactment of the Federal Rules of Evidence. Pet. Br. 26-27 (citing *United States* v. *Maynard*, 476 F.2d 1170, 1175 (D.C. Cir. 1973), and *United States* v. *Puco*, 453 F.2d 539, 541 n.6 (2d Cir. 1971), cert. denied, 414 U.S. 844 (1973)). It takes more than two decisions to demonstrate a "prevailing common-law view." Neither decision purported to be applying any settled rule of common law.[16] And other contemporaneous appellate decisions *did* find

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[15] That is understandable given both that the common law allowed the admission of all convictions, without any balancing of their probative value against their prejudicial effect, and that motions in limine were not known to the common law. See pp. 7-8, & n.3, *supra*; *Green*, 490 U.S. at 511-512.

[16] Even the law in the Second Circuit does not appear to have been settled. Just a few years after *Puco*, the Second Circuit precluded a defendant from challenging an adverse Rule 609(a)(1) ruling on appeal where the defendant had testified about the prior conviction on direct examination, stating that "even if the original ruling by the trial court was erroneous, * * * defense counsel's own use of the evidence in its direct examination as a matter of trial strategy cured any error." *Mariani*, 539 F.2d at 921.

waiver in such circumstances. See *United States* v. *Kiraly*, 445 F.2d 291, 292 (6th Cir.) (per curiam), cert. denied, 404 U.S. 915 (1971); *Shorter* v. *United States*, 412 F.2d 428, 431 (9th Cir.), cert. denied, 396 U.S. 970 (1969); cf. *United States* v. *Tocki*, 469 F.2d 655, 657 (9th Cir. 1972) (holding that the defendant's motion to exclude his prior felony convictions was properly denied, "particularly when the defendant offered evidence of his prior convictions before he was cross-examined") (citing *Shorter*).[17]

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[17] Contrary to petitioner's assertion (Br. 27 n.8), *Shorter* is squarely on point. In *Shorter*, the defendant moved in limine to exclude his prior convictions under *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965), which allowed a court to exercise its discretion to exclude prior convictions as unduly prejudicial. The district court "declined [the defendant's] invitation to consider applying the [*Luck*] rule," observing that "the rule in th[e] circuit favored the admissibility of the convictions"; the defendant then testified to his convictions on direct examination. *Shorter*, 412 F.2d at 429. On appeal, the defendant argued that the convictions should have been excluded either under *Luck* because they were unduly prejudicial or under *Burgett* v. *Texas*, 389 U.S. 109 (1967), because they were obtained in violation of his right to counsel.

As to the first point, the court of appeals rejected the defendant's reliance on *Luck* on the ground that "the trial court never actually ruled on this point because testimony regarding the convictions had not as yet been solicited at the time the question of admissibility was raised." *Shorter*, 412 F.2d at 430. The court's additional comment that the circuit had not adopted the *Luck* rule was only an alternative ground for its decision.

As to the second point, the court of appeals ruled that the defendant had waived any challenge under *Burgett* by testifying to the convictions on direct examination. The court did not, as petitioner asserts (Br. 28 n.8), indicate that its refusal to entertain the defendant's *Burgett* claim was "rooted in the fact that he did not specifically raise it before the district court." Rather, the court

As noted above (at 14-15 & n.11), since the enactment of the Federal Rules of Evidence, the federal courts have continued to diverge on this issue. The state courts also have taken varying approaches.[18] The sparse case law before the enactment of the Federal Rules of Evidence, and the contrary approaches taken by the federal and state courts both before and after that time, belie the existence of a uniform common-law approach to waiver that was intended to be codified in Rule 103.

2. Rule 609 Is Consistent With The Rule That A Defendant Waives An Objection To An In Limine Ruling On The Admissibility Of A Prior Conviction By Introducing The Conviction On Direct Examination

There is likewise nothing in the text or history of Rule 609 that suggests that a defendant cannot waive an objection to an in limine ruling on the admissibility of a prior conviction by preemptively testifying about

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rested its decision on the defendant's preemptive trial strategy:

> [The defendant] did not wait to see if the priors would in fact be offered and then object to them; rather, he offered the evidence himself as a matter of trial strategy, probably to soften the anticipated blow in the eyes of the jury. Having adopted this strategy, which appeared to be in his best interest, he cannot now be heard to complain that his own act of offering such evidence violated his constitutional rights.

Shorter, 412 F.2d at 431.

[18] Compare, *e.g.*, *State* v. *Idlebird*, 896 S.W.2d 656, 663 (Mo. Ct. App. 1995) (a defendant waives an objection to the admissibility of a prior conviction by testifying to it on direct examination), and *State* v. *Azure*, 591 P.2d 1125, 1131 (Mont. 1979) (same), with *State* v. *Eugene*, 340 N.W.2d 18, 29 (N.D. 1983) (a defendant does not waive a challenge to the admissibility of a prior conviction in such circumstances), and *State* v. *Williams*, 326 N.W.2d 678, 680 (Neb. 1982) (same).

the prior conviction on direct examination. Petitioner observes (Br. 22-23, 29-31) that Rule 609(a) was amended in 1990 to clarify that a defendant may testify on direct examination about a prior conviction in order to "remove the sting." See Fed. R. Evid. 609(a) & advisory committee's note (1990 amendment).[19] Contrary to petitioner's contention, however, no special appellate rights are protected by the amended rule.

As originally phrased, Rule 609(a) expressly allowed evidence of a witness's prior conviction to be admitted "during cross-examination." Although Rule 609(a) could thus have been read as allowing such evidence to be offered *only* during cross-examination, "virtually every circuit" concluded that Rule 609(a) was not to be given such a restrictive reading. Fed. R. Evid. 609 advisory committee's note (1990 amendment).[20] The

[19] Before the 1990 amendment, Rule 609(a) provided:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonestly or false statement, regardless of the punishment.

The amended Rule 609(a), which reflects the elimination of the reference to cross-examination, is reproduced at pages 1-2, *supra*.

[20] Courts reasoned that the reference to cross-examination was designed simply "to make clear that evidence of a prior conviction is not admissible if a person does not testify," and not to prohibit a party from eliciting evidence of a conviction from his own witness. See *United States* v. *Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir. 1976); see generally *Green*, 490 U.S. at 513-524 (discussing history of Rule 609).

1990 amendment removed the reference to cross-examination from Rule 609(a), thereby eliminating any possible ambiguity as to whether a witness may testify about a prior conviction on direct examination. The amendment did not, however, address the appellate consequences of such a trial strategy. No court has changed its position as to those consequences based on the 1990 amendment to Rule 609(a).[21]

3. The Policies Underlying The Federal Rules Of Evidence Support A Rule That A Defendant Waives An Objection To An In Limine Ruling On The Admissibility Of A Prior Conviction By Introducing The Conviction On Direct Examination

Petitioner contends (Br. 31-40) that allowing defendants to preserve an objection to an in limine ruling on the admissibility of a prior conviction even when they introduce the conviction on direct examination is supported by Congress's intent that the Federal Rules of Evidence "be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence." Fed. R. Evid. 102. In fact, those interests are better served by the contrary rule that prevents a defendant, such as petitioner here, from preempting the district court's and the government's decision whether a prior conviction is to be introduced.

First, with respect to "secur[ing] fairness in administration," the fairer rule is one that affords the govern-

[21] Compare *United States* v. *Bad Cob*, 560 F.2d 877, 883 (8th Cir. 1977) (holding under the original Rule 609 that a defendant may testify about a prior conviction on direct examination, but that the defendant thereby waives any objection to the admission of the conviction), with *Smiley*, 997 F.2d at 480 (same under the amended Rule 609).

ment, as the party whose verdict would be jeopardized by the erroneous admission of a prior conviction, an opportunity to decide at trial to forgo using the conviction. The fairer rule is likewise one that affords the district court, which could be required to conduct a second trial if the conviction is admitted in error, an opportunity to revisit its admissibility in light of the evidence at trial.

There is nothing inherently unfair about requiring a defendant to choose between introducing the conviction on direct examination, in order to gain a perceived tactical advantage, and preserving an objection to the government's introducing the conviction on cross-examination.[22] The same requirement applies to a defendant in any case in which the court declines to rule

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[22] The waiver rule does not, as petitioner's amici contend (Br. 20), produce "a systemic inequity" because, under 18 U.S.C. 3731, only the government may take an interlocutory appeal of a "decision or order of a district court suppressing or excluding evidence * * * not made after the defendant has been put in jeopardy." In the first place, Section 3731 does not permit the government to appeal a district court's analogous in limine ruling on the admissibility of a prior conviction to impeach a prosecution witness. Moreover, Section 3731, where applicable, serves to mitigate, not to exacerbate, an asymmetry in the treatment of the government and criminal defendants. Absent Section 3731, the government could never appeal a district court's ruling "suppressing or excluding evidence." The ruling would not be appealable before trial under 28 U.S.C. 1291, which is limited to "final decisions," and would not be appealable after an acquittal because of the Double Jeopardy Clause. A criminal defendant, in contrast, may challenge a district court's evidentiary rulings on appeal from a final judgent (to the extent that he has not waived an objection to those rulings). See generally *United States* v. *Sisson*, 399 U.S. 267, 293-298 (1970) (discussing background of Section 3731).

in limine on the admissibility of a prior conviction.[23] Petitioner does not dispute that the latter defendant could not introduce a conviction on direct examination and then challenge the admission of the conviction on appeal.

Petitioner nonetheless contends (Br. 32) that a waiver rule is unfair because it may cause many defendants to refrain from disclosing their convictions on direct examination,[24] which, in turn, may cause juries to infer that those defendants sought to conceal their convictions and thus are generally not credible. There is a simple solution to such concerns that does not impose the same significant costs on the judicial system as does the solution that petitioner advocates: In conjunction with the standard instruction that the jury may consider the conviction only on the question of the defendant's credibility, see 1 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 15.08 (4th ed. 1992), the district court can instruct the jury not to infer anything from the fact that the government, rather than the defendant, introduced the conviction. If a jury can be presumed to follow an instruction to ignore even prejudicial evidence, a jury surely can be presumed to follow the instruction suggested here. See, *e.g.*, *Greer* v. *Miller*, 483 U.S. 756, 766 n.8 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the

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[23] As noted above (at 9 & n.4), a party has no right to an in limine ruling.

[24] Contrary to petitioner's suggestion, however, the Ninth Circuit's well-established waiver rule did not deter her from disclosing her prior conviction on direct examination.

court's instructions and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant.") (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 208 (1987), and *Bruton* v. *United States*, 391 U.S. 123, 136 (1968)).

It is debatable whether jurors actually perceive a defendant to be more credible if he introduces a conviction himself rather than awaiting its introduction by the government.[25] And, even if such a strategy does enhance a defendant's credibility in the minds of some jurors, the reason why the strategy has that effect is uncertain. Petitioner claims that the strategy prevents jurors from inferring that a defendant intended to conceal the conviction. It is equally plausible, however, that the strategy causes jurors to credit a defendant unduly for his candor when, unbeknownst to them, he disclosed the conviction only after failing to persuade the court to exclude it. This Court should be hesitant to draw conclusions about the fairness of encouraging or discouraging a particular strategy when the inferences, if any, that jurors draw from the strategy are speculative.

Second, with respect to the "elimination of unjustifiable expense and delay," the more efficient rule is one

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[25] See Robert H. Klonoff & Paul L. Colby, *Sponsorship Strategy: Evidentiary Tactics For Winning Jury Trials* 183 (1990) (former federal prosecutors observe that "[w]e can recall no trial * * * in which a direct examiner was (or would have been) better off eliciting prior convictions or prior inconsistent statements himself instead of letting his opponent do so," notwithstanding the conventional wisdom to the contrary); but see Kipling D. Williams et al., *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 Law & Human Behavior 597 (1993) (reporting study that suggested a boon to a defendant's credibility from volunteering a prior conviction).

that affords the district court and the government an opportunity at trial to avoid the introduction of arguably inadmissible evidence, and thereby to protect against unnecessary appeals, reversals, and retrials. As explained above (at 17-18), moreover, a contrary rule could deter courts from making in limine rulings and, as a consequence, could result in more extended litigation of evidentiary issues during trial, thereby interrupting the presentation of the case to the jury.

Indeed, petitioner agrees (Br. 33) that "[t]he goal, then, is to have one trial, not multiple ones"—a goal that would seem to support a waiver rule. But petitioner then suggests (*ibid.*) that a waiver rule is somehow inconsistent with that goal because it does not "encourage[] the defendant to put on her best case." The Federal Rules of Evidence were not designed, however, to maximize a defendant's tactical advantages at trial.

Third, with respect to the "promotion of growth and development of the law of evidence," the law is most effectively advanced by evidentiary rulings made in the concrete factual context of trial and by appellate review of such rulings. It is not significantly advanced by necessarily tentative rulings in limine based on the district court's and the parties' suppositions about what evidence might be offered at trial. Nor is the law significantly advanced by appellate consideration of the somewhat hypothetical question whether the district court committed harmful error in ruling before trial that government could impeach the defendant with a prior conviction if he testified at trial. Cf. *Cook*, 608 F.2d at 1190 (Kennedy, J., concurring in part and dissenting in part) ("[T]o mandate the trial court's decision on th[e] troublesome question [whether a conviction is properly admitted as impeachment evidence

under Rule 609(a)(1)] prior to the defendant's testimony means that both the trial court's ruling and our review will be done in the dark much of the time.").[26]

All waiver rules, by their nature, foreclose appellate review. But that consequence has not been considered sufficiently compelling to preclude the widespread application of waiver rules. Cf. *New York* v. *Hill*, slip op. 4 (noting the presumptive availability of waiver with respect to "a broad array of constitutional and statutory provisions"). A waiver rule, such as that applied here, serves to filter out weak objections from the appellate process, a result that promotes judicial efficiency without impairing the development of the law.

C. A Defendant's Right To Testify Is Not Unconstitutionally Burdened By Requiring Him To Choose Between Introducing A Prior Conviction On Direct Examination And Preserving An Objection To An In Limine Ruling On The Admissibility Of The Conviction

Petitioner contends (Br. 40-46) that a criminal defendant's right to testify in his own defense is unconstitutionally burdened if he is put to the choice of testifying about a prior conviction on direct examination or preserving an objection to its admission. Although this Court has recognized that a criminal defendant has a

[26] Petitioner contends (Br. 37-38) that the courts of appeals can make their own determinations about whether a prosecutor would, in fact, have sought to introduce a prior conviction after hearing the defendant's testimony and the other evidence at trial. It is not the province of the courts of appeals to decide what tactical decisions counsel would have made if given the opportunity to do so. Cf. *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984) (courts should not second-guess counsel's tactical decisions because of the "difficulties inherent" in doing so).

constitutional right to testify in his own defense, that right "is not without limitation" and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987). Restrictions on the defendant's right to testify are thus permissible if they serve "legitimate interests" and are not "arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 55-56; accord *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998).

The waiver rule applied by the court of appeals in this case does not meaningfully restrict a defendant's right to testify. At most, the waiver rule may affect a defendant's choice about *when* to testify about a prior conviction. If the defendant wishes to preserve an objection to the admission of the conviction, he cannot introduce the conviction on direct examination, but instead must wait until the government does so on cross-examination. The defendant then may testify fully about the conviction on redirect examination (provided, of course, that the conviction has actually been offered by the government and admitted by the court).

In any event, even if viewed as a limitation on a defendant's right to testify, the waiver rule serves the same legitimate purposes that were served in *Luce*. The waiver rule preserves the ability of the district court and the government to prevent the introduction of potentially reversible error into the trial. It thereby serves important societal interests in finality and judicial economy. Because those interests would be jeopardized in every case if a defendant could preemptively introduce a prior conviction and still challenge its admission on appeal, there is nothing "arbi-

trary" or "disproportionate" about applying a per se waiver rule in this context.[27]

A rule that puts a defendant to the choice of either testifying about a conviction on direct examination and waiving an objection to its introduction, or deferring his testimony to cross- and redirect examination and preserving an objection to its introduction, is not remotely as burdensome as the rules that this Count has found to violate a defendant's right to testify or to present a defense. See *Scheffer*, 523 U.S. at 308 (rules burdening a criminal defendant's right to present a defense have been struck down only where they "infringed upon a weighty interest of the accused"). For example, in *Rock*, the Court invalidated a state rule barring hypnotically refreshed testimony that prevented the defendant, the only eyewitness to the shooting with which she was charged, from testifying that the shooting was accidental. See 483 U.S. at 61 (explaining that the rule would "disable [the] defendant from presenting her version of the events for which she is on trial"). In *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), the other case on which petitioner relies, the Court struck down a state law that barred a defendant from testifying at all unless he agreed to be the first defense witness.

The rules invalidated in *Rock* and *Brooks* thus operated to preclude key defense testimony. The waiver rule at issue here, in contrast, operates merely

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[27] Petitioner states (Br. 44-45 n.14 (citations omitted)) that in determining whether a restriction on a defendant's right to testify is "disproportionate," "[o]ne could argue that because the right to testify is a *fundamental* constitutional right, a strict-scrutiny test should apply." But this Court made clear in *Rock* that the interests justifying the restriction need be only "legitimate," not "compelling," as strict scrutiny would require. 483 U.S. at 55; accord *Scheffer*, 523 U.S. at 308.

to complicate a defendant's choice about when to testify on a collateral issue—a choice that "is indistinguishable from any of a number of difficult choices that criminal defendants face every day." *Mezzanatto*, 513 U.S. at 209. This Court has repeatedly upheld evidentiary rules that may complicate criminal defendants' tactical decisions about how, or even whether, to testify. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980) (holding that a criminal defendant is subject to impeachment with his pre-arrest silence notwithstanding that, as "a choice of litigation tactics," he then "may decide not to take the witness stand because of the risk of [such] cross-examination"); *McGautha* v. *California*, 402 U.S. 183, 215 (1971) (recognizing that a criminal defendant who chooses to testify on his own behalf is subject to "cross-examination on matters reasonably related to the subject matter of his direct examination" and to "impeach[ment] by proof of prior convictions or the like"); *Harris* v. *New York*, 401 U.S. 222, 225-226 (1971) (holding that a criminal defendant who chooses to testify may be impeached with prior inconsistent statements taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966)). As this Court has observed:

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. * * * Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

McGautha, 402 U.S. at 213 (quoting *McMann* v. *Richardson*, 397 U.S. 759, 769 (1970)). Surely, if the Constitution does not forbid a defendant from being put

to the choice whether to testify or to be subject to impeachment with prior convictions, the Constitution does not forbid a defendant from being put to the lesser choice presented here.

D. The Court Should Not Remand The Case For A Determination Whether Petitioner's Waiver Of An Objection To The Admission Of Her Prior Conviction Was Knowing And Intentional

Petitioner finally contends (Br. 46-47) that, even if a criminal defendant's introduction of a prior conviction on direct examination could constitute a waiver of an objection to its admission, the Court should remand for a determination whether the waiver in this case was knowing and intentional. There is no need for the Court to do so.

At the time of petitioner's trial, the law was well-settled in the Ninth Circuit that a criminal defendant who "introduce[s] the fact of his prior conviction on direct examination, * * * waive[s] his right to appeal the district court's in limine ruling that the evidence was admissible under Rule 609(a)(1)." *Williams*, 939 F.2d at 725; see *United States* v. *Garcia*, 988 F.2d 965, 967-968 (9th Cir. 1993) ("In *Williams* we held that a defendant waives the right to challenge on appeal the trial court's pretrial ruling that a prior conviction can be used by the prosecution for impeachment purposes when the defendant himself brought out the fact of the prior conviction on direct examination."). Petitioner's counsel is properly charged with knowledge of the waiver rule. Accordingly, when petitioner responded to her counsel's question on direct examination about her prior conviction, petitioner waived any objection to its admission.

Contrary to petitioner's suggestion (Br. 47 n.15), a criminal defendant need not personally consent to such a waiver. This Court has not required a "showing of conscious surrender of a known right * * * with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused." *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976). As this Court has recently explained:

> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. * * * Thus, decisions by counsel are generally given effect as to what arguments to pursue, *what evidentiary objections to raise*, and what agreements to conclude regarding the admission of evidence.

New York v. *Hill*, slip op. 4-5 (emphasis added; internal quotation marks and citations omitted); accord, *e.g.*, *United States* v. *Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (defense counsel may waive certain rights on behalf of a criminal defendant, including "strategic and tactical matters such as selective introduction of evidence, stipulations, objections, and pre-trial motions").

Defense counsel's decision to elicit petitioner's prior conviction on direct examination, rather than to wait for the government to do so on cross-examination and thereby preserve the issue for appeal, is precisely the sort of "strategic" or "tactical" decision that is binding on a criminal defendant. See, *e.g.*, *Henry* v. *Mississippi*, 379 U.S. 443, 451-452 (1965) (recognizing that defense counsel's "deliberate bypassing * * * of the contemporaneous-objection rule as a part of trial strategy" could constitute a waiver binding on his

client).[28] To conclude otherwise would open the door to requiring a criminal defendant's express consent to a wide array of strategic decisions made by counsel, thereby causing criminal trials to "bog down in endless warnings to the accused, followed by private consultation and choices on the record." *United States* v. *Boyd*, 86 F.3d 719, 724 (7th Cir. 1996), cert. denied, 420 U.S. 1231 (1997).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[28] The decision at issue here is not of the same character as those "fundamental decisions" that "the accused has the ultimate authority to make," such as "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). The decision is more closely analogous to the decision about which issues to raise on appeal, a decision that the *Barnes* Court recognized is not a "fundamental" one. See *id.* at 750-754; see also *New York* v. *Hill*, slip op. 5.

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In The

Supreme Court of the United States

MARIA SUZUKI OHLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PRELIMINARY STATEMENT

The main thrust of the Brief for the United States, ("BUS") is that definitive *in limine* rulings, particularly those that require a weighing of probative value and prejudice, do not exist. With this premise in hand, the Solicitor General contends that an automatic waiver rule must follow. In responding to this argument, this reply brief spends much time debunking the Solicitor General's premise. By doing so, however, petitioner does not wish to lead the Court astray from the issue presented for review.

In short, definitive *in limine* rulings are rendered on a daily basis in federal district courts throughout the country. When these rulings are rendered, the parties and the judge treat them as the law of the case, and the trial proceeds accordingly. The real question for the Court is whether a defendant who has lost an objection to such a definitive ruling automatically waives the right to appeal that ruling when she attempts to mitigate its "sting." The answer is no.

STATEMENT OF THE CASE

The Solicitor General only disputes one material fact. In a somewhat equivocal manner, he contends that the record demonstrates that the district court's Rule 609 ruling "was less than definitive." BUS at 11 n.6. The specific circumstances of the Rule 609 ruling outlined in the Brief for Petitioner ("BP"), however, demonstrate that the ruling was definitive. *See* BP at S-7. In addition, the district court, itself, believed that it had definitively ruled, as reflected by its docket entries on the day of the ruling. *See* JA at 3.

Like the district court, the court of appeals also considered the ruling definitive: "On the morning of the first

day of [petitioner's] trial, this district court concluded that, if [petitioner] were to testify on her own behalf, evidence of her past criminal conviction would be admissible under Rule 609(a)(1) to impeach her credibility." JA at 147-48. The court of appeals did not find that the ruling was in any way tentative or even "less than definitive."[1]

The Solicitor General, however, points to an exchange between the district court and the prosecutor that occurred two days before the Rule 609 ruling in support of his claim that it was "less than definitive." At that time, the district court and the prosecutor were discussing a different evidentiary issue. JA at 72. The prosecutor indicated to the district court that what he would "prefer to do is simply reserve" that other issue so that he could "revisit that issue with the Court." *Id.* In response, the district court stated: "You can always revisit the issue, Mr. Kelly [the prosecutor]. No ruling I make is with prejudice; I always keep an open mind." *Id.* Despite the Solicitor General's contention, the specific circumstances of the district court's Rule 609 ruling, which demonstrate that it was definitive, should trump this more generalized comment made on a different day and in the context of the prosecutor asking the district court to reserve ruling on a different issue. *Cf. Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.").

The only case cited by the Solicitor General in support of his contention that the district court's comment to

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[1] Not only was the court of appeals making a commonsense assessment of the record, but it was also accepting the government's characterization of the proceedings. Throughout its brief to the court of appeals, the government repeatedly characterized the district court's decision as its ruling and did not contend that it was "less than definitive."

the prosecutor rendered the Rule 609 ruling "less than definitive" is the Third Circuit's decision in *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). The circumstances in *Walden*, however, were quite different. There, "[t]he district court clearly stated at the outset of the [*in limine*] hearing that its rulings were tentative and that it would reconsider those rulings at trial, and the court never retreated from that position." *Id.* at 520.[2] "Moreover, and tellingly, [appellant]s' counsel attempted to introduce at trial other evidence that was excluded at the *in limine* hearing, which suggests that he understood the court's protocols." *Id.*

In this instance, the district court did not clearly state at the outset of the *in limine* hearing that its rulings were tentative, nor did it ever make such a statement. Even if its comment to the prosecutor could be stretched into such a statement, the nature of its subsequent Rule 609 ruling and further warning to defense counsel that petitioner's prior conviction was "obviously" admissible would constitute a retreat from that position. JA at 100. In addition, unlike counsel in *Walden*, petitioner's counsel evidently believed that the ruling was definitive, as he never would have attempted to mitigate the "sting" if he thought otherwise.

In sum, "[o]n a record such as here, it [is not] a matter of conjecture whether the District Court would have allowed the Government to attack petitioner's credibility at trial by means of the prior conviction." *Luce v.*

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[2] The Third Circuit expressed displeasure with such "tentative" rulings, observing: "we are hard pressed to see the advantages of an *in limine* hearing that only produces tentative rulings. The game would hardly be worth the candle. But that is what we are faced with here, hence we deal with it." *Id.* at 517.

United States, 469 U.S. 38, 42 (1984). That is because the district court's Rule 609 ruling was definitive, nothing less.

ARGUMENT

I.

A DEFENDANT DOES NOT ABANDON THE RIGHT TO APPEAL AN ADVERSE RULE 609 RULING BY ATTEMPTING TO MITIGATE THE "STING."

A. Introduction

Although the Solicitor General begins his analysis by proceeding directly to a discussion of *Luce* and various policy considerations, he does not appear to dispute petitioner's assertion that the question presented for review must be answered by using the three-pronged method established by the Court for interpreting the Federal Rules of Evidence ("the Rules"). Accordingly, as already argued, before considering such policy considerations in the context of *Luce*, the plain language and legislative history of Rules 103 and 609 must be considered.

B. Plain Language

The Solicitor General does not contend that the plain language of Rules 103 and 609 supports an abandonment interpretation. Instead, he essentially maintains that those rules are silent as to whether the right to appeal is abandoned by attempting to mitigate the "sting," and therefore the plain language does not provide the answer.

The Solicitor General, however, ignores the fact that Congress usually specifies when a defendant's conduct constitutes a waiver. *See* Fed. R. Crim. P. 12(f) (describing when a "[f]ailure by a party to raise defenses or objections . . . shall constitute waiver thereof"); *see also* Fed. R.

Civ. P. 12(h). Indeed, even when Congress has specified that a defendant's conduct constitutes a waiver, "the court for cause shown may grant relief from the waiver." Fed. R. Crim. P. 12(f). Thus, the Solicitor General's contention that the Rules silently provide for an *automatic* waiver rule is quite unusual.

Nevertheless, the Solicitor General contends that because waivers of evidentiary objections are "presumptively available," an automatic waiver rule is not precluded by its omission from the plain language of Rules 103 and 609. BUS at 6, 19 (citing *United States v. Mezzanatto*, 513 U.S. 196 (1995)).[3] The presumption articulated in *Mezzanatto*, however, adds very little to the analysis. Of course waiver is *available*. For example, had petitioner entered an unconditional guilty plea in the middle of her trial, she clearly would have waived the right to appeal her objection to the district court's Rule 609 ruling. *See, e.g., United States v. Olano*, 507 U.S. 725, 733 (1993). The relevant inquiry is not whether waiver is available but whether the Rules provide for waiver under the instant circumstances.

In essence, the Solicitor General emphasizes the wrong presumption. Instead, "[c]ourts should 'indulge every reasonable presumption against waiver[.]" *Barker v. Wingo*, 407 U.S. 514, 525 (1972) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). Because nothing in the

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[3] Although the Solicitor General also cites the Court's recent decision in *New York v. Hill*, 120 S. Ct. 659 (2000) as restating the *Mezzanatto* presumption, he ignores *Hill*'s instruction "that waiver is not appropriate when it is inconsistent with the provision creating the right sought to be secured." *Id.* at 664-65. As petitioner has argued, BP at 22-23, an automatic waiver rule is inconsistent with Rule 609's specific intention to allow attempts to mitigate the "sting."

plain language of the Rules states that an attempt to mitigate the "sting" automatically constitutes a waiver, the Court should presume otherwise.

C. Legislative History

Once again, the Solicitor General does not maintain that the legislative history of Rules 103 and 609, as explicated by the common law, supports an automatic waiver rule. Instead, he maintains that "[t]here was no generally accepted" common-law view, and therefore it is unclear what rule Congress intended to adopt. BUS at 20.

Petitioner has cited *United States v. Maynard*, 476 F.2d 1170, 1175 (D.C. Cir. 1973) and *United States v. Puco*, 453 F.2d 539, 541 n.6 (2d Cir. 1971) as support for her claim that a no-abandonment approach was the prevailing common-law view at the time the Rules were enacted. The Solicitor General complains that those "decisions date from shortly before the enactment of the" Rules. BUS at 21. That, however, is the point, as the first sentence of the Advisory Committee's Notes to Rule 103 states that the rule was meant to codify "the law as generally accepted *today*." Fed. R. Evid. 103 Advisory Committee's Note (emphasis added).[4]

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[4] The Solicitor General contends that "the law" referred to in the first sentence of the Advisory Committee's Notes does not include the decisions taking a no-abandonment approach; instead, he argues that the first sentence only meant to reference the proposition of law stated in the second sentence of the notes. BUS at 20-21 n.14. In attributing such a limited meaning to the first sentence, the Solicitor General has defied traditional interpretive principles, as he has essentially rendered the first sentence "surplusage – as words of no consequence." *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).

The Solicitor General also contends that the Sixth and Ninth Circuits had adopted a different approach from the Second[5] and D.C. Circuits, and therefore there was no prevailing common-law view. BUS at 21-22. However, the Sixth Circuit decision cited, *United States v. Kiraly*, 445 F.2d 291, 292 (6th Cir. 1971), entertained the merits of the defendant's appeal, albeit without much analysis. The same can be said for *United States v. Tocki*, 469 F.2d 655, 657 (9th Cir. 1972), one of the Ninth Circuit decisions cited.

Thus, the Solicitor General is left with the divided opinion in *Shorter v. United States*, 412 F.2d 428 (9th Cir. 1969). *Shorter* is not "squarely on point." BUS at 22 n.17. The district court in that case did *not* render a definitive *in limine* ruling before the defendant introduced his prior convictions. The Solicitor General glosses over this distinction. Furthermore, while the Solicitor General believes that the defendant's failure to object to the prior convictions on constitutional grounds did not factor into

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[5] *United States v. Mariani*, 539 F.2d 915, 920-21 (2d Cir. 1976) did not render the common-law view in the Second Circuit unclear. *See* BUS at 21 n.6. It is not a common-law case, *Mariani*, 539 F.2d at 920 n.3, and, in any event, is not on point. In *Mariani*, the defendant made a pretrial motion to prohibit the government from using his prior conviction. The district court ruled that the conviction was admissible to show motive but did not make a ruling on whether it was admissible for impeachment. The government did not introduce the conviction in its case-in-chief. Nevertheless, the defendant testified about the conviction on direct examination, even though he never objected on Rule 609 grounds and the government never "committed itself to using the [prior] conviction for impeachment." *Id.* at 920. Given these circumstances, the Second Circuit held that the introduction of the prior conviction could not constitute reversible error.

the majority's refusal to entertain the merits of the claim, *id.*, he does not explain why the majority addressed the constitutional claim separately from the purely evidentiary one.

In sum, the Advisory Committee's Notes explain that Rule 103 was meant to codify the law as generally accepted at the time the Rules were enacted. At that time, the prevailing common-law view was that an attempt to mitigate the "sting" did not constitute an abandonment of the right to appeal.[6] Finally, because most state courts did not address the issue until after the adoption of the Rules, their decisions are not particularly helpful in ascertaining a prevailing common-law view. Nevertheless, while petitioner agrees that the states "have taken varying approaches[,]" BUS at 24, she suggests that the prevailing view is that a defendant does not abandon an appeal by attempting to mitigate the "sting."[7]

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[6] The Court should not be persuaded by the contention that the Advisory Committee's Notes to the proposed amendment to Rule 103 undercut this analysis. BUS at 19-20 n.13. This commentary merely states that the *proposed amendment* does not address whether a party abandons the right to appeal by attempting to mitigate the "sting." BP at A-11. The commentary does not state that Rule 103, as it now exists, fails to address the question. Furthermore, even if the current Advisory Committee believes that Rule 103 is unclear as to whether a defendant abandons the right to appeal by attempting to mitigate the "sting," that does not mean that the original Advisory Committee, and the Congress that enacted Rule 103, took the same view. *Cf. United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

[7] *See, e.g., People v. Carpenter*, 988 P.2d 531, 556 (Cal. 1999); *State v. Hardy*, 946 P.2d 1175, 1177 n.2 (Wash. 1997); *People v. Williams*, 641 N.E.2d 296, 309-10 (Ill. 1994); *Salt Lake City v. Holtman*, 806 P.2d 235, 237 (Utah App. 1992); *McGee v. State*, 569 So.2d 1191, 1194-95 (Miss. 1990); *State v. McGhee*, 746 S.W.2d 460, 463 (Tenn. 1988); *State v. Miller*, 443 A.2d 906, 913-14 (Conn. 1982); *State v. Griffin*, 323 N.W.2d 198, 202 (Iowa 1982); *State v. Noble*, 612 P.2d 497, 498 (Ariz. 1980); *Vanlue v. State*, 275 N.W.2d 115, 118-19 (Wis.Ct. App. 1978), *rev'd on other grounds*, 291 N.W.2d 467 (Wis. 1980); *People v. Harris*, 272 N.W.2d 635, 638-39 (Mich. App. 1978); *State v. Ryan*, 380 A.2d 525, 527-29 (Vt. 1977).

D. Policy Considerations

1. *Luce*

The crux of the Solicitor General's argument is that *Luce* articulated various views about the nature of *in limine* rulings, particularly in the Rule 609(a)(1) context, which dictate an automatic waiver rule under the instant circumstances. Specifically, he contends that an *in limine* ruling on a prior conviction's admissibility under Rule 609(a)(1) is "necessarily tentative" because it requires a district court to balance probative value and prejudice. BUS at 11. From this premise, the Solicitor General leaps to the conclusion that an attempt to mitigate the "sting" should automatically constitute an appellate waiver because it "deprives the district court of the opportunity to rule definitively on the admissibility of the prior conviction in light of the evidence at trial, including the defendant's own testimony on direct examination, and thereby to avoid a potential error that could jeopardize any verdict of guilt obtained in the case." BUS at 15. This argument is flawed.

First, the premise is unsound. An *in limine* ruling on Rule 609(a)(1) evidence is not "necessarily tentative" because it requires a balancing of probative value and prejudice. Virtually all evidence admitted at trial is subject to a similar balancing test under Rule 403. Accordingly, under the Solicitor General's reasoning, it would be

quite rare for a district court to render a definitive *in limine* ruling in any context. As stated earlier, the result is that *in limine* hearings "would hardly be worth the candle." *Walden*, 126 F.3d at 517.[8]

Perhaps more importantly, the Rules specifically contemplate definitive *in limine* rulings even in contexts where probative value and prejudice must be balanced. For example, the unanimous view among the courts of appeals is that Rule 404(b) evidence must satisfy a Rule 403 balancing test in order to be admissible. *See* 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 404.21 [3] [a], at 404-58-404-60.1 n.37 (2d ed. 1999) (*"Weinstein's Evidence"*) (collecting cases). In order to introduce Rule 404(b) evidence, the government must provide a defendant, upon request, with "reasonable notice." Fed. R. Evid. 404(b). The notice requirement is designed to "promote early resolution on the issue of admissibility." Fed. R. Evid. 404(b) Advisory Committee Note. Also, nothing in the notice provision "precludes the court from requiring the government to provide it with an opportunity to rule *in limine* on 404(b) evidence before it is offered or even mentioned during trial." *Id.* Clearly, then, the Rules refute the Solicitor General's position that *in limine* rulings, particularly those that require a balancing of probative value and prejudice, can never be definitively made.

Strangely, the Solicitor General has routinely approved interlocutory appeals filed by the government

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[8] Such a state of affairs contradicts the proposed amendment to Rule 103, which specifically contemplates "definitive rulings . . . before trial." BP at A-5. It also conflicts with the realities of trial practice, as definitive *in limine* rulings are made every day in federal district courts throughout the country.

pursuant to 18 U.S.C. § 3731, *see* 28 C.F.R. § 0.20, of *in limine* rulings which have required a balancing of probative value and prejudice. *See, e.g., United States v. Rodriguez*, 192 F.3d 946 (10th Cir. 1999) (government appeal of exclusion of evidence under Rule 403); *United States v. Guardia*, 135 F.3d 1326 (10th Cir. 1998) (same); *United States v. Adrian*, 978 F.2d 486 (9th Cir. 1992) (same in Rule 404(b) context). It seems quite odd that the Solicitor General believes that such *in limine* rulings are definitive enough to halt the entirety of district court proceedings so that the government can file an interlocutory appeal, but are not definitive enough for a defendant to act upon them at trial.

With respect to Rule 609(a)(1) rulings in particular, the Solicitor General, by failing directly to respond to *amici*'s contention that an automatic waiver rule creates a systemic inequity in appellate rights, BUS at 26 n.22, apparently believes that the government can file an interlocutory appeal of an *in limine* ruling excluding a defendant's prior conviction.[9] Certainly, if appellate courts can make definitive rulings on Rule 609(a)(1) evidence before trial, district courts can do the same. Not only *can* district courts make such rulings, but courts and commentators have emphasized that "[t]he admissibility of convictions [under Rule 609] *should* be determined before trial whenever possible." 4 *Weinstein's Evidence* § 609.22, at 609-62 (collecting cases) (emphasis added). Indeed, even the Solicitor General's own authority states that such issues are particularly "amenable" to pretrial resolution.

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[9] In response to *amici*'s argument, the Solicitor General only asserts that the government cannot file an interlocutory appeal under section 3731 if a district court rules *in limine* that one of its witnesses can be impeached with a prior conviction under Rule 609. BUS at 26 n.22.

Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d 656, 661 n.11 (Me. 1979).

Despite the Solicitor General's contention, BUS at 10, *Luce* does not contradict this authority and the realities of trial practice by stating that a district court can never render a definitive *in limine* ruling on Rule 609(a)(1) evidence. Instead, *Luce* merely stated that a "reviewing court" cannot consider an appeal when it does not know "the precise nature of the defendant's testimony," *Luce*, 469 U.S. at 41; *id.* at 43 (Brennan, J., concurring) ("The careful weighing of probative value and prejudicial effect that Rule 609(a) requires of a district court can only be evaluated adequately *on appeal* in the specific factual context of a trial as it has unfolded.") (emphasis added), and it is only faced with a "preliminary ruling" to review. *Id.* at 42-43.[10]

While *Luce* did state that a district court "is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling," *id.* at 41-42, this comment must be read in the context of the procedural history of the case. As already explained, the district court in *Luce* only made a tentative ruling. Certainly, when a district court informs the parties that it has only rendered a tentative ruling, it is free, during the course of the trial, to change that ruling as it sees fit. However, the language in *Luce* does

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[10] The ruling in *Luce* was only "preliminary" or tentative because the district court explained "that the nature and scope of [Luce's] trial testimony could affect [its] evidentiary rulings; for example, [it] was prepared to hold that the prior conviction would be excluded if [Luce] limited his testimony to explaining his attempt to flee from the arresting officers. However, if [Luce] took the stand and denied any prior involvement with drugs, he could then be impeached by the [prior] conviction." *Luce*, 469 U.S. at 40.

not mean that a district court can never make a definitive *in limine* ruling. Indeed, just as a district court "is free, in the exercise of sound judicial discretion," *id.* at 41, to alter tentative rulings, it is also free, in the exercise of that same discretion, to determine when and how definitively it wants to rule.

When a district court exercises its discretion to make a definitive *in limine* ruling, it chooses, as Judge Easterbrook has explained, to "send [a] message that the right time [for objection and argument] has come and gone." *Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (*en banc*). Furthermore, when a district court chooses to send such a message, any "conjecture [about] whether [it will] allow[ ] the Government to attack [a defendant's] credibility at trial by means of the prior conviction" ceases. *Luce*, 469 U.S. at 42. In other words, at that point, the parties and the appellate courts know that the evidence will be admitted at trial.

In short, the premise that a district court can never make a definitive *in limine* ruling on Rule 609(a)(1) evidence is simply incorrect. District courts can make such definitive rulings, should make such rulings, and normally do make such rulings. *See, e.g., Wilson*, 182 F.3d 562. Indeed, the district court in this case did just that.[11]

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[11] One could even argue that, despite the Solicitor General's contention, BUS at 9, 27 n.23, a defendant has a right, in some circumstances, to a definitive Rule 609(a)(1) ruling before trial. Rule 12(e) of the Federal Rules of Criminal Procedure provides: "A motion made before trial *shall* be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected." Fed. R. Crim. P. 12(e) (emphasis added). Rule 12(e) was designed "to

Because the Solicitor General erroneously believes that *in limine* rulings on Rule 609(a)(1) evidence are "necessarily tentative," he wrongly concludes that a district court will always want the opportunity to change such supposedly tentative rulings thereby "avoid[ing] a potential error that could jeopardize any verdict of guilt obtained in the case." BUS at 15. In essence, in order to suit his own interests in this particular case, the Solicitor General has mischaracterized the nature of all *in limine* rulings and further assumed what a district court's interests are in rendering such rulings.

For a variety of reasons, many district courts, such as the one in this case, may want to render a definitive ruling at the *in limine* stage. A district court may prefer to rule while the relevant law is fresh in its mind. It may be particularly bothered with interruptions during trial, which require the jury to wait for long periods of time. It may believe that a definitive *in limine* ruling will help the parties settle the case, or it may believe that it has heard all of the arguments and has all of the information that it needs to make a definitive ruling. In the Rule 609 context, a district court may believe that, in fairness, the parties should have an advance ruling so that a defendant can decide whether to remain silent or to mitigate the "sting," or so the government can exercise its right to file an interlocutory appeal. The reasons are endless.

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discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary." Fed. R. Crim. P. 12 Advisory Committee Note. Similarly, a Rule 609 question cannot be reserved, without good cause, in the hope that a defendant will not testify thereby making a ruling unnecessary. In any event, this issue is obviously left for another day, as the district court in this case rendered a definitive *in limine* ruling.

Despite these endless reasons, the Solicitor General believes that a district court can never make a definitive *in limine* ruling on Rule 609(a)(1) evidence and would never want to make such a ruling because of a desire to protect the government's record on appeal. Certainly, protecting the *government's* appellate record is not a district *court's* sole preoccupation. Although the Solicitor General emphasizes that district courts have broad discretion in controlling trial proceedings, BUS at 9 n.4, his contradictory argument hamstrings district courts, as it requires them to rule at a particular time, in a particular way, and for a particular reason.

In sum, the Solicitor General has distorted *Luce* to advance policy arguments that, if accepted, would seriously upset the nature of district court proceedings. In the end, the Solicitor General's absolutist view of *in limine* rulings conflicts with the realities of trial practice, realities that have developed over the years for very good policy reasons.

2. Rule 102

The Court should not be persuaded by the Solicitor General's attempts to undermine petitioner's Rule 102-based policy arguments. With respect to petitioner's claim that an abandonment interpretation unfairly requires a defendant to appear as if she is hiding facts from the jury, the Solicitor General contends that it is not even clear that remaining silent about the conviction on direct examination has any detrimental effect. BUS at 28 (citing an article written by former federal prosecutors). Empirical studies, however, have rejected the only authority cited by the Solicitor General. *See* Douglas S. Rice & Ellen L. Leggett, *Empirical Study Results Contradict Sponsorship Theory*, 7 No. 8 Inside Litig. 20 (1993).

Even federal prosecutors have consistently employed the "time-honored trial tactic" of attempting to mitigate the "sting." *United States v. Freeman*, 164 F.3d 243, 249 (5th Cir. 1999) (prosecutor attempted to mitigate the "sting"); *see, e.g., United States v. King*, 505 F.2d 602, 606 (5th Cir. 1974) (same). In short, trial attorneys for the government, criminal defense practitioners, Congress, and the Court, *see Old Chief v. United States*, 519 U.S. 172, 189 (1997), have all recognized the dangers associated with being perceived by the jury as hiding something. One discredited study should not cause the Court to doubt the unfairness of having to remain silent about the prior conviction on direct examination.[12]

With respect to judicial economy, the Solicitor General believes that a no-abandonment approach creates unnecessary expense because the government is not given the opportunity to decline to use the prior conviction and thereby avoid a potential appellate issue. BUS at 29. If, however, the government is uncertain about using the conviction, all it has to do is say so, and appropriate measures can be taken. *See* BP at 38-39. This is a very

[12] The contention that a jury instruction can eliminate an unfair perception, *see* BUS at 27, suffers from the traditional problem that calling the jurors' attention to the omitted testimony may be more harmful than the supposedly curative instruction. Perhaps more importantly, it seems odd to create a waiver rule through judicial legislation, and then, through further judicial invention, create a jury instruction to cure the problems with the judicially-created rule, when Congress has specifically provided that the way to cure this precise unfairness is to allow a party the freedom to attempt to mitigate the "sting."

slight burden when considering that the Court has traditionally "placed the entire responsibility on the prosecution to show [a] claimed waiver . . . ." *Barker*, 407 U.S. at 514.

The government should not be allowed to seek a prior conviction's admission, never mention any indecision about admitting the conviction, and then claim on appeal that a defendant has waived the right to challenge the conviction's admission because it may have ultimately decided not to introduce it. Under such circumstances, the government should be deemed to have waived the waiver argument. *Cf. United States v. Martinez-Salazar*, 120 S. Ct. 774, 783 (2000) (Scalia, J., concurring) (questioning "whether normal principles of waiver (not to say the even more fundamental principle of *volenti non fit injuria*) disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent").[13]

Finally, the Solicitor General contends that a no-abandonment approach does not further the growth and development of the law of evidence because the record when a defendant attempts to mitigate the "sting" is not "concrete" enough for effective appellate review. BUS at 29. The Solicitor General, however, has not given one reason why the record in this case is insufficient for appellate review, including a harmless-error analysis.

[13] To the extent that *Martinez-Salazar*, 120 S. Ct. at 781, encourages a defendant not to deal with a district court's error in an attempt to win at trial, and instead simply to wait for appeal, it is merely *dicta*.

II.

AN AUTOMATIC WAIVER RULE UNCONSTITUTIONALLY INTERFERES WITH THE RIGHT TO TESTIFY.

With respect to petitioner's constitutional claim, the Solicitor General fails to recognize that *Rock v. Arkansas*, 483 U.S. 44 (1987), established a disjunctive test. Under the first prong of this disjunctive test, an evidentiary rule is unconstitutional if it arbitrarily interferes with the right to testify. The Solicitor General does not respond to petitioner's contention that an *automatic* waiver rule is constitutionally flawed because it arbitrarily applies even in the absence of any possible interest supporting such a rule.

This case is an excellent example. Here, it was clear that the district court wanted to render a definitive *in limine* ruling, did render such a ruling, and did not desire to reconsider the issue later at trial. Likewise, given the fact that the government affirmatively moved to admit the prior conviction, and given its subsequent arguments, there was no doubt that it was going to use the prior conviction on cross-examination. Accordingly, there are no interests that are served by applying a waiver rule in this case.

In addition, the Solicitor General's claim that an automatic waiver rule "operates merely to complicate a defendant's choice about when to testify on a *collateral* issue[,]" BUS at 32-33 (emphasis added), contradicts the position taken by the government's trial counsel, who argued to the district court that such evidence was "critical." JA at 65. The Court should hold the government to its original position in this case, *cf. Doggett v. United States*, 505 U.S. 647, 653 (1992) (rejecting government's attempt "to revisit the facts"), which is the correct one.

III.

A REMAND IS REQUIRED TO DETERMINE WHETHER ANY ABANDONMENT OF THE RIGHT TO APPEAL WAS KNOWING AND INTENTIONAL.

Assuming, but not conceding, that trial counsel could waive the right to appeal the Rule 609 ruling on behalf of petitioner, there has still been no finding that he knowingly and intentionally relinquished that right. Without citation to any authority, the Solicitor General argues that there does not have to be a remand for such a finding because trial "counsel is properly charged with knowledge of the waiver rule[,]" BUS at 34, as it had been articulated by the Ninth Circuit in *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991).

The law in the Ninth Circuit, however, is to the contrary. *See United States v. Perez*, 116 F.3d 840 (9th Cir. 1997) (*en banc*). In *Perez*, the Ninth Circuit held that a defendant did not waive the right to appeal an erroneous jury instruction even though his attorney requested the instruction, because the record did not reveal that the attorney knew of the Ninth Circuit precedent that had held that the instruction was flawed. *Id.* at 844-46 (applying *Olano*). Accordingly, even if the right to appeal could be waived by trial counsel, a remand is still required to determine whether he knowingly and intentionally relinquished the right to appeal.

Finally, even if petitioner's trial counsel "is properly charged with knowledge of the" law, BUS at 34, it was not clear whether an automatic waiver rule, as articulated in *Williams*, still applied in the Ninth Circuit at the time of petitioner's trial. The Ninth Circuit had not considered whether the automatic waiver rule still applied after the 1990 amendment to Rule 609, which specifically clarified

that attempts to mitigate the "sting" are permitted. *See* BP at 30. The Ninth Circuit apparently believed that this was a significant enough development to revisit the issue in a published opinion. *See United States v. Ohler*, 169 F.3d 1200 (9th Cir. 1999). Moreover, at the time of the trial, the most recent precedent, albeit from another court of appeals, had rejected the automatic waiver rule. *See United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997). Given this state of the law, it is not clear whether trial counsel knowingly and intentionally relinquished the right to appeal the Rule 609 ruling on behalf of petitioner.

CONCLUSION

The Court should reverse and remand with instructions to entertain the merits of the Rule 609 claim or, alternatively, with instructions to determine whether there was a knowing and intentional abandonment of the right to appeal.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

MARIA SUZUKI OHLER

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FEDERAL DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a criminal defendant automatically waives the right to appeal a definitive, pre-trial ruling granting, over her objection, the government's *in limine* motion to impeach her with a prior conviction under Federal Rule of Evidence 609 if she attempts to mitigate the "sting" of such evidence by first testifying about the conviction on direct examination.

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This *amicus curiae* brief is submitted in support of Petitioner, Maria Suzuki Ohler. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure that procedures in criminal cases are applied fairly and in accordance with due process.

The Federal Defender Association (the "FDA") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. It is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of Federal Public Defender Offices. Its primary mission is to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

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[1] As required by Rule 37.6 of this Court, the *amici curiae* submit the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

The NACDL and the FDA urge this Court to overrule the Ninth Circuit's decision, which establishes a rule of automatic waiver of the appellate right to challenge pretrial rulings under Federal Rule of Evidence 609 in cases where defendants testify in reliance upon those rulings. According to the Ninth Circuit, a defendant who unequivocally objects to the admission of prior convictions forfeits the right to challenge an erroneous decision by the trial court ruling such evidence admissible if he adapts his direct testimony to respond to the trial court's adverse and definitive ruling. The Ninth's Circuit's rule contradicts a long-acceptable litigation tradition of "removing the sting" of impeachment evidence ruled admissible *in limine*, by conferring upon the impeaching party the exclusive right to control how the evidence is presented to the jury as a condition to preserve an appeal. Because neither the text or the history of Rule 609 indicates that Congress intended a departure from traditional practice or the usual rules governing preservation of appellate rights, this Court should not legislate such a policy.

The NACDL and the FDA support reversal of the Ninth Circuit's decision because it is a product of judicial lawmaking and is antithetical to the basic principles that guide both organizations. The automatic waiver rule unfairly presents defendants with a cruel dilemma: either forgo an effective presentation of the defendant's testimony at trial or forgo the right to appeal an erroneous evidentiary ruling. The rule deprives them of the ability to adapt their defense to adverse pretrial rulings and impedes the truthseeking mission of the jury because it forces a defendant to conceal from the jury his willingness to tell his side of the story, so long as the court has ruled that the story may be told. An automatic waiver rule further impairs the ability of trial courts to manage the manner and mode of presenting evidence in order to achieve a speedy, fair and efficient resolution of the case. Moreover, the unfairness created by an automatic waiver rule is unnecessary, when the objectives of the

appellate process and the ability of the government fairly to present its case can be protected without such a rule.

SUMMARY OF ARGUMENT

Nothing in the text of the Federal Rules of Evidence or in the Federal Rules of Criminal Procedure supports the Ninth Circuit's holding that criminal defendants who rely on adverse *in limine* rulings under Federal Rule of Evidence 609 and introduce prior convictions on direct examination automatically waive their right to challenge the *in limine* ruling of the trial court on appeal. It is an established principle that courts should not infer a waiver of rights from the Federal Rules absent a clear indication that waiver is intended. No such clear indication emerges from the historical evolution of the Rules of Evidence, traditional litigation practice, or common law principles of waiver and forfeiture.

Moreover, an automatic waiver rule is unfair to criminal defendants from a policy perspective, creates unintended disparities in the appellate rights of defendants vis-à-vis the government, and impairs the trial court's authority to manage the mode and manner of presentation of the evidence. It is unfair because a defendant is forced, in order to preserve his appellate rights, to appear to the jury as if he is concealing information that he would prefer to disclose in his direct testimony so long as the court has ruled the evidence admissible. The disparity in appellate rights arises from the government's ability to obtain review of *in limine* rulings by virtue of an interlocutory appeal under 18 U.S.C. § 3731, whereas the automatic waiver rule effectively extinguishes the ability of a defendant to obtain review of that same ruling after final decision. The automatic waiver rule impedes the trial court's ability to control the presentation of evidence, because it deprives trial courts of the ability to issue conclusive pretrial rulings so that the parties may conform the evidence to those rulings.

The government's reasons in support of an automatic rule are unpersuasive. The principal authority it relies upon, *United States v. Luce*, 469 U.S. 38 (1984), does not compel, or even suggest, a rule of waiver in circumstances like Ms. Ohler's. The rationale of that case applies only where all pre-conditions placed upon the trial court's *in limine* ruling were not met at trial. The government's protestation that permitting defendants to rely upon *in limine* rulings and remove the sting of impeachment robs it of the decision whether to introduce the evidence does not outweigh the policies supporting the defendant's right to remove the sting of impeachment that is certain to occur. The government has in its control the power to notify the court that it has changed its mind about using the evidence at any time before the defendant elicits it. In any event, an automatic waiver rule is not a necessary response to the government's stated concern. Rather, the trial court may safeguard the government's ability to make the final decision whether the evidence is introduced by forcing the government to make its election before the defendant terminates his direct examination.

ARGUMENT

Rule 609 of the Federal Rules of Evidence, as amended in 1990, openly invites a criminal defendant to introduce evidence of his own prior convictions during his direct testimony if those convictions may be introduced as impeachment evidence by the government. Fed. R. Evid. 609 advisory committee's notes (removing "from the rule the limitation that the conviction may only be elicited during cross-examination"). The drafters of the 1990 amendment to Rule 609 commented that it is "common" for testifying witnesses to seek "to 'remove the sting' of the impeachment." *Id.* The question raised in this case is whether, by exercising the acknowledged privilege to respond on direct examination to evidence unequivocally ruled admissible by a trial court, a defendant necessarily

forfeits the right to challenge the underlying ruling of admissibility, which he has actively opposed.

The lower court answered this question by imposing a rule of automatic waiver in *all* cases where the defendant first mentions the challenged evidence in reliance upon an adverse ruling. The Ninth Circuit's rule applies even if the government has stated an unequivocal intent to introduce the evidence during cross-examination, even if the trial court has issued a definitive ruling and signaled that it will not be open to reconsideration, and even if the defendant renews his pretrial objection during his direct testimony in order to give the Court the opportunity to change its mind and the government the choice to withdraw its stated intent to introduce the evidence itself. As a result, a defendant who diligently raises all available objections to admission of the evidence until further objection is futile cannot avoid renunciation of her right to appellate review of erroneous rulings if she attempts to meet, in advance, points that will inevitably be raised in the government's cross-examination. The rule conditions the right to appeal error on the defendant's willingness to forgo his ability to present his own testimony in the manner that is the most likely to convince the jury of his innocence.

The *amici* agree with the petitioner that nothing in the Federal Rules of Evidence or the common law supports an inflexible forfeiture of appellate rights as a consequence of conforming one's case to a court's definitive *in limine* rulings. The fair and efficient administration of justice requires rejection of such an automatic forfeiture rule.

I.

AUTOMATIC FORFEITURE SHOULD NOT BE READ INTO THE FEDERAL RULES OF EVIDENCE ABSENT A CLEAR INDICATION OF INTENT TO CREATE SUCH A POLICY

A litigant's ability to obtain an appellate ruling on the merits of a particular issue depends first upon whether an appellate court has jurisdiction to entertain the question presented, and second upon whether the appellant properly preserved his right to challenge the trial court's resolution of that issue against him. To determine whether these two prerequisites have been satisfied, a court must interpret statutes conferring appellate jurisdiction and consult procedural rules governing the preservation of error.

Defendants who appeal from a final judgment of conviction and sentence in a criminal case rest jurisdiction on the court of appeals' power to review final decisions of district courts under 28 U.S.C. § 1291. Section 1291, though limited to appeal of "final" decisions, includes within its scope all interlocutory rulings leading up to the final decision to the extent that they have not been rendered moot by subsequent events. *United States v. Hamide*, 914 F.2d 1147, 1152 (9th Cir. 1990) (citing *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988); *Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123, 126 (7th Cir. 1997) ("an appeal at the end of the case brings up all interlocutory orders"). Thus, a pretrial evidentiary ruling excluding evidence, though not a "final decision" under Section 1291 when made, is "merged" into the final judgment, *Koppers Co. Inc. v. Aetna Cas. & Sur. Co.*, 158 F.3d 170, 173 n.2 (3d Cir. 1998), giving the appellate court jurisdiction to review it upon final judgment in the case.

Because there is no jurisdictional obstacle to appellate review of an *in limine* ruling after final judgment in a criminal case, a decision of a court of appeals not to review the merits of an issue must rest upon a forfeiture of the right

to appeal. The general procedure that a defendant must follow to prevent forfeiture of the right to challenge an adverse ruling by the district court is contained in the Federal Rules of Criminal Procedure. Federal Rule of Criminal Procedure 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor . . . .

The Federal Rules of Evidence amplify the defendant's obligations to preserve challenges to a trial court's evidentiary rulings. Rule 103 provides that "[e]rror may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike appears of record." The policy behind a timely objection rule is plain: "An appeal . . . without an objection at trial would bushwhack both the judge and the opponent. Objections alert the judge at critical junctures so that errors may be averted." *Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (*en banc*).

Nothing in Rule 609 defines the meaning of "timely" in the context of objections to the admissibility of impeachment evidence, or suggests that an objection to a pretrial ruling admitting such evidence is "untimely." Nor does anything in that rule suggest or require that a defendant necessarily waives his right to challenge a court's pretrial ruling admitting prior convictions that *the government has stated an intent to introduce*, if he softens the blow of impeachment by introducing the evidence first. A defendant who has stated a clear objection to admission of a prior conviction in a contested pretrial hearing and received a conclusive order

stating the evidence will be admitted has satisfied the purpose of the timely objection rule by placing the judge and opposing counsel on notice of the grounds for the alleged error.

Waiver of rights is not lightly read into the Federal Rules of Evidence, and has been disapproved when the language of the rules is silent on the issue. *Mitchell v. United States*, 119 S. Ct. 1307, 1312-13 (1999) (refusing to read a waiver of the right to decline to testify into Rule 11, which did not explicitly provide that such waiver is a consequence of a guilty plea). Congress knows how to signal to a defendant when his behavior will result in waiver. Some rules do make explicit that certain action or inaction by a defendant results in the inability to raise a claim of error. *See, e.g.*, Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict."). This Court should resist the invitation of the Ninth Circuit to imply such a bar absent an indication that the legislature intended to make waiver of appellate rights a consequence of a litigation strategy that it expressly acknowledged and condoned when it adopted Rule 609.

II.

FORFEITURE OF APPELLATE RIGHTS IN RULE 609 CASES DOES NOT SERVE THE POLICIES THAT PROMPT WAIVERS IN OTHER CONTEXTS

This Court finds waiver of appellate rights in other contexts based on its perception that the defendant has manipulated the trial process by (1) sandbagging the district court, *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977), or (2) acting inconsistently with the right asserted on appeal, *Taylor v. United States*, 414 U.S. 17 (1973).[2] Neither of

[2] Courts also recognize that a defendant may expressly waive appellate rights as consideration for obtaining some other benefit from the government. *E.g., United States v. Mezzanatto*, 513 U.S. 196 (1995) (permitting defendant to forgo appeal in exchange for benefit of plea bargain). Defendants in Ms. Ohler's position have not expressly agreed to waive rights in exchange for some benefit they did not already possess.

those rationales justifies a waiver of rights in cases such as this one.

A decision to "remove the sting" of impeachment evidence by presenting it first on direct examination in cases such as Ms. Ohler's does not sandbag the district court or the government, so long as the defendant's objection was fully and fairly presented in a pretrial setting. Such cases do not pose the situation where the defendant lulled the district court into committing error by failing to raise a contemporaneous objection and by flagging the error only after it was too late to correct the record. The defendant, *having already objected to the admission of the convictions and lost*, reasonably reacted to the certainty that the evidence would surface by softening the blow.

Nor is the defendant's decision to remove the sting of impeachment by testifying on direct examination at all inconsistent with his position that the evidence should not come in at all. If the evidence is certain to be admitted, the defendant's choice merely reflects adaptation to reality. Arguing that a defendant's response to real world adversity is inconsistent with his position that the evidence should not be admitted is akin to suggesting that a person's actions in handing over his wallet at gunpoint is "inconsistent" with his position that he is entitled to keep it.

The certainty that the evidence will be admitted is not manufactured by the defendant to manipulate the trial process. The certainty is created by the *government*'s representation on an *in limine* motion that it intends to introduce the evidence as impeachment and upon the *court*'s definitive judgment that such impeachment is appropriate

and admissible. Should the development of evidence at trial alter the government's previously expressed intent to introduce the prior convictions as impeachment, it may easily prevent the inadvertent admission of evidence that *no* party wishes to introduce by informing the defendant and court that it will not introduce this evidence on cross-examination before defense counsel elicits it.

A defendant will never introduce his own prior convictions in the absence of real certainty that the evidence will otherwise surface simply "to sow the seeds of error." *United States v. Wilford*, 493 F.2d 730, 736 (3d Cir. 1974). Most battles over the admissibility of prior convictions do not occur as a result of the misapplication of the plain terms of Rule 609 (*i.e.* erroneous admission of convictions not involving dishonesty punishable by less than one year). Rather, they involve disputes over the appropriate balance of the probative value of the prior conviction against the prejudice to the defendant – a judgment on which appellate courts normally defer unless the calculus is unreasonable. Given this deferential standard of review, no defendant will risk the certain and extreme damage to his case that will be caused by introducing one of the most powerful forms of impeachment evidence in order to preserve the highly uncertain prospect of prevailing on appeal.

III.

AN AUTOMATIC FORFEITURE RULE DISREGARDS TRADITIONAL LITIGATION PRACTICE AND IMPOSES UNFAIR COSTS ON DEFENDANTS IN CRIMINAL CASES

The practice of anticipating the admission of harmful evidence by an opponent and softening its blow is an important tool in the trial lawyer's arsenal, which boasts an historic pedigree. 1 McCormick on Evidence § 42 at 166. A trial lawyer who is aware that his opponent will, in reliance on the advance approval of the judge, impeach his witness wisely takes the opportunity to place the damaging evidence

in context before his opponent has the chance to surprise the jury. A remorseful explanation out of the mouth of the offending witness may allow the jury to understand and forgive the reasons for his actions, and to better appreciate the "'real character,' the whole person." *United States v. Bad Cob*, 560 F.2d 877, 883 (8th Cir. 1977); *see also United States v. Medical Therapy Services, Inc.*, 583 F.2d 36, 39 (2d Cir. 1978) ("[T]he law does not limit a party to witnesses of good character, nor does it compel a party to conceal the bad record of his witnesses from the jury, to have it afterwards revealed by the opposing party with telling effect. Such a rule would be unfair alike to the party calling the witness and the jury.") (quoting *People v. Minsky*, 227 N.Y. 94, 98, 124 N.E. 126, 127 (1919)). Allowing litigants to anticipate and address impeachment evidence advances the truthseeking function of a trial. A jury may more easily evaluate a defendant's credibility – one way or the other – when it can listen to the direct testimony of the witness in response to non-leading questions as opposed to through the testimony of government counsel embedded in leading questions on cross-examination.

But the technique of "removing the sting" when used in the context of Rule 609 evidence is more than just a savvy tactical maneuver. Failure to preempt evidence of prior convictions may have a "devastating" effect on a defendant's case because "the jury may infer that the defendant is attempting to hide his prior convictions and will likely focus more on them in assessing his credibility." *United States v. Williams*, 939 F.2d 721, 724 (9th Cir. 1991). As Judge Easterbrook has explained for the Seventh Circuit, sitting *en banc*:

> Sensible adaptations [to trial strategy] could not be accomplished if [the witness] had to wait until [the opposing party] offered the evidence himself, and then raise an objection, acting in the jury's eyes as if he had something to hide. Waiting, objecting and

> only then trying to make something of the subject not only would divest [the testifying party] of the initiative but also would deprive him of an alternative theory of the case.

Wilson, 182 F.3d at 566.

Prosecutors, as well as criminal defendants take advantage of the practice of preempting damaging impeachment to ameliorate its punch. In a parallel set of circumstances to this case, prosecutors may and routinely do deflect impeachment based on its witnesses' records of prior convictions by eliciting that information themselves. In *United States v. Vanco*, 131 F.2d 123, 125 (7th Cir. 1942), the court ruled that the government could introduce the prior convictions of its own witness because "this no doubt would have been done by the appellant, had the government failed to do so. The government therefore was warranted in anticipating such cross-examination and in eliciting such testimony on direct examination." Likewise, the Seventh Circuit in *United States v. Ewings*, 936 F.2d 903, 909 (7th Cir. 1991) approved the government's use of prior conviction evidence in direct examination of its own friendly witness, observing,

> [A] trial is not just combat; it is also truthseeking; and each party is entitled to place its case before the jury at one time in an orderly, measured, and balanced fashion, and thus spare the jury from having to deal with bombshells later on. It is on this theory that defense counsel, in beginning their examination of a defendant, will often ask him about his criminal record, knowing that if they do not ask, the prosecutor will do so on cross-examination. What is sauce for the goose is sauce for the gander.

Id. (quotation and citation omitted).

Prosecutors also elicit other sorts of impeachment evidence that they fought unsuccessfully to suppress in order to mitigate the defense's cross-examination. For instance, the government may first attempt to suppress evidence that its agents threatened its own witness with revocation of immunity or other displays of force if the witness did not confirm the government's theory of events at trial. *See, e.g. United States v. Anderson*, Cr. No. 98-20030 (D. Kan. 1999) (rejecting government's motion *in limine* to exclude prosecutor's profanity and physical threat against a witness during an interview when the witness did not acknowledge the inference the government drew from certain documents). But if its attempt at suppression is fruitless, it will avail itself of the opportunity to explain away those "threats" through the testimony of its own "threatened" witness, blunting the shock that a jury would otherwise experience in learning that the witness who has just delivered the goods for the government may well have done so to save his own skin. *Id.* In still another set of circumstances, the government may wish to deal delicately on direct examination with evidence of a complaining victim's prior sexual history under Federal Rule of Evidence 412, once a trial court announces that such evidence is fair game for a defendant to explore on cross.

The use by the government of this sensible trial strategy comes at no price – it is not forced to relinquish rights of appeal (because it has none following a defendant's acquittal) nor is it required to forego any other rights as a condition of its choice. Without affirmative evidence that Congress intended to place an additional cost on a defendant's exercise of a trial tactic that is available for free to the government, this Court should not manufacture one.

IV.

AN AUTOMATIC FORFEITURE RULE IMPAIRS THE ABILITY OF TRIAL COURTS TO MANAGE THE ORDERLY PRESENTATION OF EVIDENCE AT TRIAL

The NACDL and FDA avidly endorse a system of criminal justice that permits an accused defendant to present all available defenses to charges of criminal misconduct in a manner that emphasizes both the speed with which a defendant may obtain vindication and fairness of procedures. To that end, the *amici* support procedures that give trial judges the ability to resolve contested evidentiary matters in advance of trial outside the hearing of the jury, *see, e.g.*, Fed. R. Evid. 103(c) and 104(c), because such rules streamline the trial (reducing both the cost to defendants and the chance that jurors will blame inefficiency of the system on the defendant) and eliminate the risk of juror speculation that a defendant's legitimate evidentiary objections at trial reflect an attempt to obstruct the truthfinding process.

The Ninth Circuit's automatic waiver rule undermines these goals inasmuch as it rests on the following rationale:

> Even if the district court rules before trial that the prior conviction will be admissible if offered, based on the defendant's expected defense, it is always possible that the court will change its mind on hearing the defendant's actual testimony. The district court should retain discretion to reverse itself when this testimony brings into sharper focus the question of admissibility.

Williams, 939 F.2d at 724. In an apparent effort to maximize the flexibility of trial courts, the rule actually reduces the ability of a trial court to control the efficient presentation of trial evidence by *requiring* it to leave a ruling open to change when the court otherwise feels the record has been adequately developed to render a definitive ruling. The

amici do not dispute that a trial court *may* reserve the right to change its mind; they merely dispute that it *must* do so. Without the power to render a definitive ruling at a pretrial stage, courts will be unable to prevent endless debate of settled issues throughout the trial and will encourage litigants to juggle multiple theories of the case before the jury even after the trial court has signaled its intent to foreclose one or more options.

The Ninth Circuit's characterizaton of *in limine* motions as inexorably tentative is in tension with a substantial body of case law recognizing that litigants generally need not reassert objections to the admission or exclusion of evidence, if such objections were adequately presented, considered and definitively overruled on a motion *in limine*. *See*, *e.g.*, *Richardson v. Missouri Pacific R.R. Co.*, 186 F.3d 1273, 1276 (10th Cir. 1999); *Wilson v. Williams*, 182 F.3d 562, 564 (7th Cir. 1999) (*en banc*); *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 454-55 (3d Cir. 1999);*United States v. Williams*, 81 F.3d 1321, 1325 (4th Cir. 1996); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1118-19 (8th Cir. 1985).

The Ninth Circuit itself has adopted this position in a case not cited by the court below, *Palmerin v. City of Riverside*, 794 F.2d 1409, 1410-13 (9th Cir. 1986) (rejecting argument that plaintiffs waived appellate review of *in limine* ruling admitting evidence of their prior guilty pleas). The court offered a rationale that cannot be squared with the notion that an *in limine* ruling necessarily remains tentative throughout the trial (*id.* at 1413 & n.3):

> [W]here the substance of the objection has been thoroughly explored during the hearing on the motion *in limine*, and the trial court's ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of that evidence. In applying

> this approach, we find that the Palmerins have preserved their objection for appeal. The substance of the objection to the admission of the guilty pleas was thoroughly explored during the hearing on the motion *in limine*, and the trial judge's ruling was explicit and definitive. There was no hint that the ruling might be subject to reconsideration. Perhaps most important, there was nothing in the manner or context in which the guilty pleas were introduced at trial that was unforeseen or that cast any doubt on the applicability of the trial court's *in limine* ruling.

A proposed amendment to the Federal Rules of Evidence will amend Rule 103(a) to codify this rule favoring finality of pretrial rulings: "Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Proposed Amendments to the Federal Rules of Evidence, 181 F.R.D. 133, 134; *see also id.* at 136-37.

Aside from the tension between the automatic waiver rule and the rule dispensing with the need for renewed objections, the Ninth's Circuit's waiver rule creates perverse incentives that *reduce* the chances that contested evidentiary issues will be aired prior to trial, thereby further depriving the Court of opportunities to manage the presentation of evidence. A rule that requires the defendant – and only the defendant – to abandon appellate rights in exchange for removing the sting of impeachment will lead defendants to devise their own methods for leveling the playing field. Defendants will be less likely to raise evidentiary questions on an *in limine* basis if they know that the government may blunt the effect of a ruling in the defendant's favor, but that they will not be afforded reciprocal rights. Given the limited discovery offered the government in criminal cases, reduced use of *in limine* motions for such purposes will increase disruption at trial necessitated by lengthy sidebars and

deprive courts of the opportunity to consider the arguments presented for admission or exclusion of the evidence in an orderly and thoughtful fashion. *See Palmerin*, 794 F.2d at 1413 ("District judges should '[e]ncourage counsel to bring motions in limine on evidentiary questions. This will prevent disruptions at trial which could render the proceedings incoherent to the jurors.'") (quoting Judge's Manual for the Management of Complex Criminal Jury Cases § 2.2 (1982)); MANUAL FOR COMPLEX LITIGATION (THIRD) § 32.23 (1995) ("Addressing these [evidentiary issues] before trial allows the judge and attorneys to give them more deliberate consideration than during trial .... .").

V.

AN AUTOMATIC FORFEITURE RULE DOES NOT FOLLOW FROM *UNITED STATES V. LUCE*

The government's principal argument in favor of an automatic waiver rule rests upon *United States v. Luce*, 469 U.S. 38, 41-42 (1984), but its conclusion is neither compelled by nor a logical outgrowth of the rationale supporting that decision.

In *Luce*, this Court held that a defendant can only preserve his objection to an *in limine* ruling admitting prior conviction evidence if he takes the stand. 469 U.S. at 40-41. The trial court had made its Rule 609(a)(1) decision admitting the evidence was necessarily conditioned on the defendant testifying at trial, but the condition was never satisfied because the defendant chose, for whatever reason, not to testify. In circumstances where the conditions of an *in limine* ruling are not satisfied, the ruling has no effect on the trial. *Wilson*, 182 F.3d at 565. Appellate court review would be impossible because there is no factual basis to determine whether error occurred, and if it did, whether it was harmless:

> A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context. This is particularly true under Rule 609(a)(1), which directs the court to weigh the probative value of a prior conviction against the prejudicial effect to the defendant. To perform this balancing, the court must know the precise nature of the defendant's testimony, *which is unknowable when, as here, the defendant does not testify.*

Luce, 469 U.S. at 41 (emphasis added).

The concerns motivating the decision in *Luce* are completely absent in cases where *all* pre-conditions to the district court's ruling that prior convictions are admissible have been satisfied by the defendant's taking the stand and giving the testimony that, under the *in limine* ruling, renders the prior conviction evidence admissible. In cases such as Ms. Ohler's, the defendant actually does testify, so there is a non-speculative factual basis for performing the balancing of probative value and prejudice required by the rule. Moreover, whereas in *Luce* there could have been many reasons other than the *in limine* ruling for the defendant's choice not to testify, here it is apparent that there was one and only one reason for the defendant's testimony on direct about the prior conviction: the district court's ruling that the conviction would be admissible on cross-examination. Had the court ruled in the defendant's favor on the *in limine* motion, there would be no conceivable reason to introduce the damning information. Finally, a reviewing court will have no trouble determining whether an abuse of discretion in admitting a defendant's prior conviction could be harmless in light of the full record developed at trial.

VI.

AN AUTOMATIC FORFEITURE RULE CREATES UNFAIR DISPARITIES IN THE RELATIVE APPELLATE RIGHTS OF CRIMINAL DEFENDANTS AND THE GOVERNMENT

The petitioner rightly points out that one effect of the Ninth Circuit's decision is to stunt development of case law interpreting Rule 609 because most district court decisions will become effectively unreviewable by virtue of waiver. Most defendants saddled with the baggage of prior convictions ruled admissible will either blunt the blow of impeachment by testifying or forego the opportunity to testify altogether. Under the one-two punch of the Ninth's Circuit's waiver rule and *Luce*, admissibility determinations in any case where a defendant selects one of these options cannot be reviewed on the merits by an appellate court at the behest of the defendant.

Thus, the automatic waiver rule would deprive defendants of effective appellate review. At the same time, however, it would permit appeal by the government on a distinctly incomplete record. The government in criminal cases, due to the one-sided effects of the Double Jeopardy Clause, has a statutory right to appeal some interlocutory rulings that other parties may not appeal before a final decision under § 1291 is rendered. Congress has authorized government appeals from a "decision or order suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict." 18 U.S.C. § 3731. The theory behind the statute is that whereas criminal defendants may obtain effective review after final judgment, the government loses its rights to correct error if the jury acquits. Therefore, if a district court excludes evidence of prior convictions under Rule 609 on a motion *in limine* decided before the onset of trial, the government may seek reversal of the pretrial exclusion order in the Court of

Appeals – at a point when the Court of Appeals has no way to know whether the defendant will, in fact, elect to testify.

Giving the government a second bite at obtaining a favorable outcome under Rule 609 through interlocutory appeal when the district court rules against it while effectively precluding review by criminal defendants when the court rules in the government's favor would introduce a systemic inequity. Absent an explicit indication of intent, it is not reasonable to conclude that Congress intended such a result when it approved the rules.

VII.

AUTOMATIC FORFEITURE IS NOT NECESSARY TO SATISFY THE GOVERNMENT'S ASSERTED NEED TO CONTROL THE DECISION WHETHER TO INTRODUCE PRIOR CONVICTION EVIDENCE

The government has argued that an automatic forfeiture rule is necessary to protect its ability to make – at the last possible moment – the ultimate determination whether to introduce the evidence or to withhold the damaging evidence from the jury to forestall a potentially meritorious appeal. For all of the reasons expressed in this brief, the government's tactical desire to reserve judgment until after the defendant has testified is outweighed by the defendant's need to remove the sting of impeachment and the systemic benefits of allowing him to do so. Any argument that permitting a defendant to anticipate impeachment on direct examination deprives the government altogether of the choice whether the evidence comes in is simply not persuasive.

When the government takes a position on a contested motion *in limine* and announces that it intends to introduce evidence of prior convictions, it has made a choice on which the defendant is entitled to rely until informed to the contrary. If the government's stated intentions change

during the course of the trial, the government can inform the defendant and the court of the change prior to the defendant taking the stand.

Even if this Court were to disagree that the government bears this burden, it should not accept the automatic waiver rule as the only acceptable safeguard of the government's asserted interests. Instead, it should adopt procedures in the exercise of its inherent supervisory authority that protect both the government's ability to make its own choices about what evidence to offer and the defendant's ability to testify in response to conclusive adverse rulings without forgoing the right to appeal. To that end, this Court could prospectively require all defendants to renew their objections to the admission of prior convictions at the time they take the stand. Assuming the trial court remains steadfast in its previously conclusive decision that evidence is admissible, it should then be required to exercise its authority under Federal Rule of Evidence 611(a) and require the government to make an election before the defense passes the witness. That Rule provides that a trial court has the authority to

> exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect the witness from harassment or undue embarrassment.

Fed. R. Evid. 611(a).

Requiring the government to make its choice before the witness is passed would promote two of the three goals of Rule 611, and have no adverse impact upon the third. It would make the presentation effective for the ascertainment of truth because it does not disingenuously hide from the jury the defendant's desire to confront this evidence at the outset, and it would offer some protection from the undue embarrassment of responding for the first time about a

criminal history through questions posed by a hostile opposing counsel. And it would not force the government to make an uninformed election, because by this time of trial, the record has already been fully developed. At that point, the government is able to decide for itself the risk of appellate reversal if the prior convictions are introduced.

CONCLUSION

For the foregoing reasons, the automatic waiver rule of the Ninth Circuit should be rejected and the decision below should be overruled.

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